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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

WALTER S. TAYLOR, Petitioner,
-v-
TAYLOR WINE CO., INC., JOSEPH L. SWARTHOUT, SHERMAN FARNHAM, ALEXANDER D. HARGRAVE, COCA-COLA CO., and LINCOLN FIRST BANK OF ROCHESTER, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was the principle of *Basic Incorporated v. Levinson*, U.S. , 108 S.Ct. 978, 99 L.Ed.2d 194 (March 7, 1988) that "a single fact or occurrence cannot be determinative in an inherently fact-specific finding such as materiality" under the proxy laws ignored by the Second Circuit, when it held that as a matter of law there was no material omission in the proxy statement soliciting the approval by the stockholders of the target company of a merger into the acquiring company because no agreement had been reached with anyone else when the omitted information concerned:

(a) the circumstances of the initial selection of the acquiring company by the president and chief merger negotiator of the target company as its exclusive merger negotiating partner when there were numerous known suitors for a merger with the target company,

(b) the timing of a job commitment made to the president of the target company by the acquiring company prior to its selection as the exclusive merger negotiating partner,

(c) the leaking of confidential information by the president of the target company to the acquiring company to ensure that the acquiring company would have an exclusive on negotiating a merger with the target company,

(d) the concealment of material information through false testimony and the material alteration of a document submitted in the course of an SEC investigation and in a document attached to the Schedule 13D filed with the SEC,

(e) the coordinated efforts by the acquiring company, the target company, and the trustee for many of the Taylor Wine stockholders to suppress the required disclosure under the Federal Securities Laws for the stated reason that there was concern by the acquiring company that such disclosure might drive up the price to be paid the target company stockholders and the disclosure might lead to competing tender offers?

2. Was the holding of this Court in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), which was followed by another panel of the Second Circuit in *State of New York v. Hendrick-*

son Brothers, Inc., 840 F.2d 1065 (2d Cir. February 16, 1988), that when there is a dearth of market information affected by the collusive action of the defendants, the plaintiff's burden of proving damages is lightened, ignored by the Second Circuit which held that as a matter of law damages could not be established because no firm offer had been made to the target company after the target company had said it was not interested in merging with anyone when:

(a) there were sworn statements by a senior vice president of a Fortune 500 company in testimony before the SEC and in an affidavit that it was willing to pay more for the target company than the acquiring company had,

(b) the finance committee of the board of directors of the acquiring company had authorized a higher offer for the target company than it actually paid on the merger, and

(c) there was expert testimony that the target company could have been sold for more than the acquiring company had paid based on the data assembled for the merger negotiations at the direction of the target company's investment banker?

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WALTER S. TAYLOR, Petitioner,
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TAYLOR WINE CO., INC., JOSEPH L. SWARTHOUT, SHERMAN FARNHAM, ALEXANDER D. HARGRAVE, COCA-COLA CO., and LINCOLN FIRST BANK OF ROCHESTER, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, the plaintiff, Walter S. Taylor, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 4, 1988, or in the alternative, to remand this case to the United States Court of Appeals for the Second Circuit for reconsideration in light of *Basic Incorporated v. Levinson*, U.S. , 108 S.Ct. 978, 99 L.Ed.2d 194 (March 7, 1988) decided one business day after the decision by the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit entered on March 4, 1988, which is unreported, appears at page A53 of the appendix. The opinion of the Court of Appeals for the Second Circuit denying the petition for rehearing and rehearing en banc, which is unreported, appears at page A54. The opinion of the District Court approving the Report and Recommendation ("Report") of the Magistrate, which is unreported, appears at page A52. The Report of the Magistrate appears at page A1 of the appendix.

JURISDICTION

Petitioner invoked the District Court's jurisdiction under § 27 of the Securities Exchange Act of 1934 to enforce rights created under §§10(b) and 14(a) of that act. The judgment of the Court of Appeals for the Second Circuit affirming the granting of summary judgment dismissing the complaint was entered on March 4, 1988. A timely petition for rehearing and rehearing en banc was denied on April 20, 1988. Petitioner's time to file this petition was extended by two orders of this Court to September 17, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

STATUTES AND REGULATIONS

This petition involves Sections 10(b) and 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78 j(b) and 15 U.S.C.§ 78n(a) and Rule 10b-5, 17 C.F.R.§ 240.10b-5 and Rule 14a-9, 17 C.F.R. §240.14a-9 promulgated by the SEC thereunder. These statutes and rules are reprinted in the Appendix at pages A59-A60.

STATEMENT OF CASE

On December 2, 1976 the stockholders of Taylor Wine Co., Inc. ("Taylor Wine") were asked to approve a merger with a subsidiary of The Coca-Cola Company ("Coca-Cola") and on January 20, 1977 the merger was approved and consummated. Under the terms of the merger one share of Coca-Cola was exchanged for 3.75 shares of Taylor Wine. Petitioner Walter S. Taylor a stockholder of Taylor Wine and a beneficiary of a trust that held shares of Taylor Wine for his benefit, challenges that merger. Mr. Taylor contends that the Proxy Statement used to solicit stockholder approval of the merger was false and misleading.

The public offering of the 14% Block

In August 1976 a registration statement was filed with the SEC for a public offering of 14% of the outstanding stock ("14% Block") of Taylor Wine. The stock had been held by Lincoln First Bank of Rochester ("Lincoln Bank") on behalf of others, primarily in fiduciary capacity. Some of the stock being sold was held by the bank as custodian for Alfred University. Lincoln Bank also held another 13% of the outstanding stock of Taylor Wine on behalf of others, which was not being offered for sale.

The offers to purchase the 14% Block

Beginning in late August, Lincoln Bank received several offers to purchase the entire 14% Block at prices above the market. Between August 27, 1976 and September 8, 1976, Lincoln Bank received offers for the entire 14% Block from Marne Obernauer and IFI, S.A., Beatrice Foods, Norton-Simon, Coca-Cola, and Pepsico. Taylor Wine acknowledged to the SEC that its board was aware that the parties seeking the 14% Block regarded acquisition of that block as the "first step toward acquisition of Taylor [Wine] itself" and that each of the bidders was interested in acquiring Taylor Wine. Joseph L. Swarthout, the president and chief executive officer of Taylor Wine, told the bidders other than Coca-Cola that if that bidder acquired the 14% Block, Taylor Wine would not be interested in discussing the possibility of a merger for several months.

The terms of the bidding for the 14% Block

Lincoln Bank had told each of the bidders for the 14% Block that "none of the details [of their bids] in any way would be made known to any of the offerors" and that "it would not assist in the structuring of any offer nor comment . . . as to the adequacy or content of any offer." All the bidders but Coca-Cola were told their bids had to be unconditional cash bids. The bank set September 8, 1976 as the deadline for the submission of bids and said it would announce its decision on that date as to which bid it would accept.

The job assurances Mr. Swarthout received from Coca-Cola prior to the merger negotiations and the change in his attitude towards a merger with Coca-Cola.

On September 6, 1976 Mr. Swarthout met with several Coca-Cola officials. At that meeting he received assurances from Coca-Cola that in the event of a friendly merger, his position would be protected. Prior to September 7, 1976, Mr. Swarthout had not voiced any objection to the Norton Simon offer to Lincoln Bank nor had he voiced any interest in Taylor Wine merging with anyone. On September 7, 1976, Mr. Swarthout told Lincoln Bank of his strong preference for the Coca-Cola bid and that he thought a merger could be negotiated between Coca-Cola and

Taylor Wine. For the first time, he voiced objections to the bid of Norton Simon.

The status of the bids for the 14% Block on September8,1976

The morning of September 8, 1976, the highest bidder for the 14% Block was Norton Simon at $20.00. per share. The bid of Coca-Cola was $15.25 per share in the event a merger was not negotiated within the contract period. In the event a merger was agreed to, the shares in the 14% Block would be treated the same as all of the other Taylor Wine shares. In addition, the Coca-Cola bid required Lincoln Bank to not sell any of the other Taylor Wine stock that it held in fiduciary capacity until after the contract expired. The stated purpose was to insure that Coca-Cola would have an exclusive on negotiating a merger with Taylor Wine.

The Pepsico bid which came in on September 8, 1976, provided for a minimum bid of $18.01 per share and $.10 a share more than any other bona-fide bid up to $20.13. Lincoln Bank acknowledged that the Pepsico bid had to match a bid for $20.00.

Mr. Swarthout at the request of Lincoln Bank told Coca-Cola in secret the terms of the Pepsico bid

After the Pepsico bid, Mr. Swarthout was told by bank officials the terms of the Pepsico bid and that Coca-Cola would have to raise its bid to above the $18.00 level to be accepted. The bank expected and requested Mr. Swarthout to relay this information to Coca-Cola. Mr. Swarthout immediately contacted Harry Teasley, the senior Coca-Cola official in Rochester, and made arrangements to meet with him secretly. Mr. Teasley, his immediate subordinate, Mr. Curtis, and Coca-Cola's investment banker, Mr. Goodwin, had come to Rochester for the bidding. They were together at a hotel in Rochester when Mr. Swarthout called Mr. Teasley. Mr. Swarthout excluded both Mr. Curtis and Mr. Goodwin from the meeting. Swarthout testified before the SEC that he wanted to meet alone with Mr. Teasley because of the "sensitive nature" of the information he was going to leak to Mr. Teasley. Mr. Swarthout met alone with Mr. Teasley at his hotel room and relayed the information he had received from the bank. Mr. Teasley contacted his superiors at Coca-Cola and based on the information received from Mr. Swarthout, Coca-

Cola changed the floor price of its bid to $18.07 per share. Lincoln Bank then accepted the Coca-Cola offer. Coca-Cola agreed that it would buy the 14% Block at $18.07 per share if a merger were not negotiated with Taylor Wine. Lincoln Bank also agreed not to sell any of the other Taylor Wine stock that it held in fiduciary capacity and instructions were given within the bank to stop any sales of Taylor Wine stock from any trust accounts

Herman Schaefer, the executive vice president of Pepsico, testified before the SEC that Pepsico would have changed its bid had it known the terms of the other bids. Pepsico would have bid as high as $22 a share in cash for the 14% Block.

Coca-Cola did not disclose the floor price of its deal with Lincoln Bank in a Schedule 13D or a press release

In disclosing to the public the beginning of the merger talks and the sale of the 14% Block, a decision was made to not disclose the floor price of the deal between Lincoln Bank and Coca-Cola. A press release was issued on September 8, 1976 announcing that Coca-Cola had agreed to acquire the 14% Block from the bank and Taylor Wine and Coca-Cola were engaged in merger talks. No disclosure was made of the floor price in the press release. According to an internal Coca-Cola memo the press release was issued to "forestall a tender offer." Coca-Cola did not file a Schedule 13D concerning the deal with the bank. Mr. Teasley testified before the SEC that if Coca-Cola were required to file a Schedule 13D which would disclose the floor price of its agreement with Lincoln Bank, it would set a target for anybody "to shoot at who wanted to steal away the merger." Mr. Schaefer stated under oath that Pepsico would have considered a tender offer prior to the signing of the merger agreement in October, 1976 had it know the floor price of Coca-Cola's deal with Lincoln Bank.

Mr. Swarthout advised Coca-Cola that "the merger would not swing on fifty cents or a dollar because the people issues were so important and they felt comfortable with the Coca-Cola Company" and he only negotiated with Coca-Cola

White Weld, Coca-Cola's investment banker in its letter of September 21, 1976, observed that the agreement tying up the 14% Block allowed Coca-Cola to negotiate with Taylor Wine

on an exclusive basis. Mr. Swarthout testified at his deposition that no attempt was made by Taylor Wine to approach any other party to inquire whether they would make an offer and First Boston, Taylor Wine's investment banker was not asked to canvass the market for a competing offer. Mr. Swarthout told Coca-Cola's investment banker at the beginning of the merger talks that "the merger would not swing on fifty cents or a dollar because the people issues were so important and they felt comfortable with the Coca-Cola Company."

The SEC investigation of Coca-Cola's acquisition of the 14% Block and the failure of Coca-Cola to file a Schedule 13D.

On September 16, 1976, the Securities and Exchange Commission authorized an investigation *"In The Matter Of Trading In The Securities Of Taylor Wine., Inc.* (File No. HO-965) to investigate whether there had been insider trading, the circumstances surrounding Coca-Cola's agreement with Lincoln Bank, and whether the schedule 13D's should have been filed.

In the SEC investigation, Lincoln Bank supported Coca-Cola in its attempt to suppress disclosure of the floor price of their deal. In a brief submitted to the SEC, Lincoln Bank observed that Coca-Cola did not want the terms of its deal with Lincoln Bank disclosed because the disclosure of those terms could have an adverse impact on the merger price then being negotiated between Coca-Cola and Taylor Wine. All the stock held by Lincoln Bank would be exchanged at the price than being negotiated by Taylor Wine and Coca-Cola in their merger talks. Taylor Wine joined with Lincoln Bank in supporting Coca-Cola's attempt to suppress the disclosure Coca-Cola thought might drive up the price that it would have to pay the Taylor Wine stockholders on a merger with Coca-Cola.

The representations to the SEC that provision 1c of the Coca-Cola Lincoln Bank agreement had been deleted and the inclusion of that provision in the copy of agreement signed by Alfred University.

In response to specific questions, both Mr. Teasley of Coca-Cola and Mr. McBride of Lincoln Bank testified before the SEC that the provision in paragraph 1c of their agreement had been deleted on September 8, 1976. That provision provided that Lin-

coln Bank would not sell any of the remaining shares of Taylor Wine that Lincoln Bank held. Mr. McBride informed Alfred University on September 16, 1976 that Coca-Cola would not consent to the deletion of provision 1c. The copies of the agreement Alfred University was asked to sign already had the manual signatures of both Coca-Cola and Lincoln Bank and provision 1c was not deleted. Alfred University's copy of the agreement and an internal memo of the university concerning that discussion were submitted to the District Court. In the copy of the agreement annexed to the Schedule 13D, belatedly filed by Coca-Cola after the staff advised that they would recommend the institution of an action, that provision was deleted.

The value of the Taylor Wine stock

For the merger negotiations Taylor Wine calculated the replacement value of the assets per share of Taylor Wine. This was the first time that figure had been calculated. Taylor Wine's investment banker had identified the $25.95 per share replacement value of the assets of Taylor Wine as an indication of the value of Taylor Wine in the material prepared for the merger negotiations and recommended the use of that figure in the merger negotiations. According to Mr. Swarthout about half this figure, $12.65, was derived from an appraisal that was originally used for insurance purposes.

The finance committee of the board of directors of Coca-Cola authorized the negotiators to pay up to $23.00 a share for Taylor Wine. Mr. Schaefer of Pepsico affirmed in an affidavit submitted by the defendants that Pepsico was prepared to offer the same amount, for all the outstanding stock of Taylor Wine that Pepsico was willing to pay for the 14% Block, namely $22. per share in cash. His only speculation had been whether Pepsico would have been forced to go that high.

In October 1976,Taylor Wine and Coca-Cola concluded their negotiations and came to an agreement in principle on a merger subject to stockholders' approval. Under the terms of the merger the stockholders of Taylor Wine would exchange their stock of Taylor Wine for shares of Coca-Cola at an exchange ratio of 3.75 shares of Taylor Wine for one share of Coca-Cola. Professor Jensen, defendants' expert witness pointed out that the value of

the Coca-Cola offer was reflected in the market price of Taylor Wine. The market price of Taylor Wine never exceeded $20.30 a share and the imputed market value of the Coca-Cola stock, received by Taylor Wine stockholders for each share of Taylor Wine stock was $20.30 on the day of the merger.

Coca-Cola filed its Schedule 13D almost two months late after the Staff of the SEC informed it that the staff would recommend an action be brought against Coca-Cola.

After the staff of the SEC's Division of Enforcement informed Coca-Cola that the staff intended to recommend enforcement proceedings against Coca-Cola for violation of the reporting requirements of the Exchange Act and the rules thereunder, Coca-Cola filed a "Statement on Schedule 13D" on November 12, 1976. Provision 1c was crossed out in the copy of the agreement annexed to the Schedule 13D.

The members of the staff from the Division of Corporation Finance who reviewed the Proxy Statement did not participate in the SEC investigation.

None of the members of the staff of the SEC within the Division of Corporation Finance of the SEC who reviewed the proxy statement had any involvement in the SEC investigation In the final comment letter on the Proxy Statement, Taylor Wine and Coca-Cola were advised that any problems relating to the SEC investigation should be resolved with the Division of Enforcement.

The Proxy Statement mailed to the Taylor Wine stockholders.

On December 2, 1988 , the Proxy Statement of Taylor Wine was mailed to the stockholders of Taylor Wine soliciting their approval of a merger with Coca-Cola and the resulting exchange of stock. Reference was made to the registration statement filed by Taylor Wine covering the 14% Block. There was no reference to the secret leaking by Mr. Swarthout to Coca-Cola of information relating to the bidding process or of the circumstances of the bidding process for the 14% Block.

In the Proxy Statement it was stated that "no significant changes in [Taylor Wine's] existing management are expected to take place after the merger." It was not disclosed that the job com-

mitment to Mr. Swarthout by Coca-Cola was made prior to the selection of Coca-Cola as the negotiating partner for Taylor Wine and that immediately thereafter Mr. Swarthout for the first time expressed a strong preference for Coca-Cola.

Reference was made to the authorization by the SEC of an administrative proceeding against Coca-Cola. It was not disclosed that false testimony had been given to the SEC in the course of its investigation concerning the terms of the Lincoln Bank Coca-Cola agreement or that the copy of the agreement furnished the SEC during the investigation had been altered. It was also not disclosed that before the SEC, Lincoln Bank had supported Coca-Cola in its attempt to suppress the required disclosure in a Schedule 13D because of Coca-Cola's concern that the disclosure would have an adverse impact on the price Coca-Cola might have to pay the stockholders of Taylor Wine in the merger then being negotiated with Taylor Wine. Nor was it disclosed that Taylor Wine had also supported Coca-Cola in its attempt to suppress the required disclosure.

Reference was made to the filing of a Schedule 13D by Coca-Cola in the Proxy Statement. There was no disclosure in the Proxy Statement that the Schedule 13D was belatedly filed "nearly two months" late and that the Coca-Cola Schedule 13D filed was false and misleading in disclaiming ownership of the 14% Block and because the copy of the Coca-Cola-Lincoln Bank attached to the Schedule 13D had been altered.

The merger of Taylor Wine into Coca-Cola on January 20, 1977 and the value of the stock received by the stockholders of Taylor Wine.

On January 20, 1977 the stockholders of Taylor Wine approved the merger and it was consummated that same date. The value of the Coca-Cola stock received by the stockholders of Taylor Wine for each share of Taylor Wine stock was $20.30. This was a $1.70 per share less than Pepsico was willing to pay, $2.70 per share less than Coca-Cola was willing to pay, and $5.65 per share less than the replacement value of the assets per share of Taylor Wine and the amount plaintiff's expert testified Taylor Wine stockholders could have received.

No gain or loss was recognized on the merger. Therefore for many, if not the vast majority, of the stockholders of Taylor Wine it was not advantageous that no gain or loss would be recognized on the transaction for tax purposes, because they would not be able to realize a loss for tax purposes on the exchange. For most of Taylor Wine's history the stock had traded at over $20.30 per share.

Mr. Swarthout was asked to take early retirement in the fall of 1978 and continued to serve as president of Taylor Wine until 1981.

Mr. Killeen, the senior Coca-Cola official in charge of Coca-Cola's wine operations following the merger, testified that the management of Taylor Wine proved inept. In the fall of 1978 Mr. Swarthout was asked to take early retirement. He did not receive extra benefits for early retirement. Instead, he stayed on as president for over four years until 1981 when he finally retired.

The decision by the SEC that the Schedule 13D filed by Coca-Cola was belatedly filed and misleading

Five months after the stockholders of Taylor Wine had voted on the merger, the SEC in its decision entitled *In The Matter Of The Coca-Cola Company,* 12 SEC Docket 927 (June 21, 1977) Security Exchange Act of 1934, Release No. 13,655 (reprinted in the appendix at pages A55-A59) found that Coca-Cola had filed a schedule 13D "nearly two months" late and that Mr. Swarthout had leaked inside information to Coca-Cola to insure that it would be able to negotiate a merger with Taylor Wine without having to face competing offers from other companies.

The filing of the complaint on behalf of the stockholders of Taylor Wine.

Petitioner brought this action against Coca-Cola, Lincoln Bank, Taylor Wine and three of its directors on his own behalf and on behalf of the class of the Taylor Wine stockholders. Petitioner's principal allegations in the complaint were that defendants' actions in using a proxy statement that was misleading by reason of omissions to solicit stockholders approval of the merger of Taylor Wine into Coca-Cola violated §§10(b) and 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§78

j(b) and 78n(a) and Rule 10b-5, 17 C.F.R. §240:10b-5, and Rule 14a-9, 17 C.F.R. §240:14a-9 promulgated by the SEC pursuant to those sections. The transaction involved the exchange of stock of Taylor Wine for stock of Coca-Cola. Therefore it was subject to the prohibitions against fraud in connection with the purchase or sale of a security under section 10(b) and Rule 10b-5. The transaction also involved the solicitation of proxies and was therefore subject to the prohibitions against fraud and manipulative devices in connection with the solicitation of proxies contained in section 14(a) and Rule 14a-9, 17 C.F.R. §240:10b-5.

Judge Telesca granted plaintiff's class action motion. The class was defined as all stockholders of Taylor Wine as of the mailing of the proxy statement to the stockholders of Taylor Wine.

The Magistrate's Report and Recommendation that the defendants' motion for summary judgment be granted

Following the conclusion of discovery, defendants made a motion for summary judgment which was referred to the Magistrate to hear and report. In recommending the granting of defendants' motion for summary judgment, the Magistrate adopted a fact specific test. He found that because no definitive agreement had been reached with any of the other parties who had offered to buy the 14% Block, there was no need to disclose any more than had been disclosed in the Proxy Statement and that accordingly the proxy statement here at issue was not misleading. The Report concluded:

> As a matter of law, Taylor Wine and Coca-Cola were under no obligation to disclose any more than they did. Recent federal circuit court decisions support this court's conclusion that specific terms of the other bids for a portion of Lincoln's stock were immaterial to the merger proposal as a matter of law. In *Reiss v. Pan American World Airways, Inc.*, 711 F.2d 11,14 (2d Cir 1983) the Second Circuit held as a matter of law that there is no duty to disclose ongoing merger negotiations citing *Staffin v. Greenberg*, 672 F.2d 1196 (3rd Cir. 1982. [Citations omitted] Such negotiations do not rise to the level of a material corporate development requiring disclosure until the parties have reached an

> agreement in principle to merge. which includes an agreement as to price and the structure of the merger. *Greenfield,* 742 F.2d at 745.

[A23]

He further held that plaintiff had not submitted any evidence that stockholders of Taylor Wine could have obtained more for their Taylor Wine stock than had been paid by Coca-Cola if the transaction were undone and thus could not establish any damages. The Magistrate rejected plaintiff's offer of the minutes of the finance committee of the board of directors of Coca-Cola to show that Coca-Cola had been prepared to and had been willing to pay $23.00 a share for Taylor Wine. He held:

> In his third theory of damages, plaintiff asserts that the Taylor Wine stockholders should receive damages measured by subtracting the value of the merger exchange on the date of the shareholder's vote from the $23 maximum price per share that Coca-Cola management authorized in connection with the merger negotiations with Taylor Wine. This court agrees with defendants' characterization of this theory as specious. As with the prior two "theories", plaintiff has cited no case which would support the adoption of such an uncertain measure of damages.

[A33]

He also rejected the plaintiff's proffer of the affidavit of Herman Schaefer, the Executive Vice President of Pepsico, who confirmed his earlier testimony before the SEC and in an affidavit submitted by the defendants that Pepsico was willing to pay $22.00 a share for all of Taylor Wine and might have gone even higher had it had access to financial information that had never been made public. Mr. Schaefer in his affidavit of September 24, 1985 had stated:

> In using the word "conjecture", in the testimony before the SEC, I was not referring to whether Pepsico would have bid higher, which Pepsico would have certainly done, but that the conjecture was whether Pepsico would have had to go to the $22 per share number which it was prepared to do under its model to acquire the 603,648 shares of Taylor

> Wine stock that Lincoln Bank was than selling, if Pepsico had been aware of the other offers or the bank's attitude. In any event, Pepsico would have considered the submission of a different form of bid if Pepsico had been advised that Lincoln Bank was considering or preferred a different form of bid than a cash offer, which Lincoln Bank had mandated. Pepsico was also willing to pay $22.00 per share to acquire all of Taylor Wine and our models were prepared on the assumption that the acquisition of the 603,648 shares was a preliminary step to acquisition of all of Taylor Wine.

The Magistrate held:

> Plaintiff would have this court, if it found liability on the part of the defendants, calculate damages based on what other companies might have, but did not offer either for the purchase of the Lincoln stock or in connection with a full-fledged merger with Taylor Wine. Plaintiff's own submissions highlight the uncertain and speculative nature of this theory of damages. Such speculation does not provide a legitimate measure of damages.

[A34]

The District Court affirmed on the basis of the Report. The Court of Appeals for the Second Circuit affirmed for the reasons discussed in the Report on Friday, March 4, 1988. On Monday, March 7,1988, this Court decided *Basic Incorporated v. Levinson* U.S. , 108 S.Ct. 978, 99 L.Ed.2d 194 (March 7, 1988). In reliance upon *Basic* and the very recent and then unreported decision of the Second Circuit in *State of New York v. Hendrickson Brothers, Inc.*, 840 F.2d 1065 (2d Cir. February 16, 1988), plaintiff moved for reargument. That motion was denied.

REASONS FOR GRANTING THE WRIT

THE DECISION BY THE SECOND CIRCUIT APPLYING THE "AGREEMENT IN PRINCIPLE" DOCTRINE TO DETERMINE THAT THERE WAS NO MATERIAL OMISSION IN THE PROXY STATEMENT IS IN DIRECT CONFLICT WITH THIS COURT'S MOST RECENT DECISION IN *BASIC INCORPORATED V. LEVINSON* AND SHOULD BE REVIEWED BY A WRIT OF CERTIORARI AND REVERSED, OR IN THE ALTERNATIVE, REMANDED FOR RECONSIDERATION.

The Court of Appeals in affirming for the reasons set forth in the Report has created a standard for testing materiality under the federal securities laws that is in direct conflict with this Court's holding in both *Basic Incorporated v. Levinson*, U.S. , 108 S.Ct. 978, 99 L.Ed.2d 194 (March 7, 1988) and *TSC Industries, Inc. v. Northway*, 426 U.S. 438 (1976). This Court in *Basic* held:

> In *TSC Industries* this Court explained: "The determination [of materiality] requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him. . . ."426 U.S., at 450. After much study, the Advisory Committee on Corporate Disclosure cautioned the SEC against administratively confining materiality to a rigid formula. Courts also would do well to heed this advice.
>
> We therefore find no valid justification for artificially excluding from the definition of materiality information concerning merger discussions, which would otherwise be considered significant to the trading decision of a reasonable investor, merely because agreement-in-principle as to price and structure has not yet been reached by the parties or their representatives.

(108 S.Ct. 985-86, 99 L.Ed.2d 211)

The courts below in finding that the Proxy Statement was not misleading expressly relied upon the "agreement in principle" doctrine that the omitted information was not material as a matter of law. Thus, it was stated :

> As a matter of law, Taylor Wine and Coca-Cola were under no obligation to disclose any more than they did. Recent federal circuit court decisions support this court's conclusion that specific terms of the other bids for a portion of Lincoln's stock were immaterial to the merger proposal as a matter of law... Such negotiations do not rise to the level of a material corporate development requiring disclosure until the parties have reached an agreement in principle to merge, which includes an agreement as to price and the structure of the merger.

[A23,A53]

It would have been of significance to some investors to know that Mr. Swarthout, the president of Taylor Wine, had taken active steps to insure that Coca-Cola would be the exclusive negotiating partner for Taylor Wine in the face of numerous known suitors for Taylor Wine. This included leaking inside information to Coca-Cola in violation of a committment made to all the other bidders, supporting Coca-Cola in its attempt to suppress the required disclosure before the SEC, not asking Taylor Wine's investment banker to solicit other parties to negotiate a merger, and advising other parties that Taylor Wine was not interested in merging.

In *Revlon Inc v. MacAndrews & Forbes Holdings, Inc.* 506 A.2d 173, 182 (Del. 1986), the court held that once a corporation chooses to consider a merger or buyout it is incumbent upon the Board to obtain the best possible price, and not to sacrifice price to deal with one party to the exclusion of all others because managment feels comfortable with that suitor. The court said:

> The Revlon board's authorization permitting management to negotiate a merger or buyout with a third party was recognition that the company was for sale.... The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit. The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.

> Selective dealing to fend off a hostile but determined bidder was no longer a proper objective. Instead, obtaining the highest price for the benefit of the stockholders should have been the central theme guiding director action.

(506 A.2d at 182)

Here Mr. Swarthout received assurances from Coca-Cola that his job would be protected even *before* his selection of Coca-Cola as the merger negotiating partner for Taylor Wine, and *before* he undertook to take active steps to insure that Coca-Cola would be Taylor Wine's exclusive negotiating partner. The Courts below excused the failure to disclose the timing of the making of the commitment to Mr. Swarthout even though it would have been relevant to Mr. Swarthout's self-interest in the selection of Coca-Cola as exclusive negotiating partner forTaylor Wine. But this Court in the landmark case of *S.E.C. v. Capital Gains Research Bureau, Inc.* 375 U.S. 180, 201, (1963) held:

> An investor . . . must if the legislative purpose be served, be permitted to evaluate such overlapping motivations, through appropriate disclosure, in deciding whether an adviser is serving "two masters" or only one, "especially . . . if one of the masters happens to be economic self-interest." United States v. Mississippi Valley Co., 364 U. S. 520, 549

The courts below on defendants' motion for summary judgment assumed that there was no facts to support the claim that Mr. Swarthout received a sweetheart deal before the negotiations began because he was asked to take early retirement after the merger. There is an internal contradiction in the Report which clearly demonstrates the error of the courts below in perceiving that there was no factual evidence of a sweetheart deal prior to the selection of Coca-Cola as the negotiating partner for Taylor Wine, the timing of which should have been disclosed. In the Report it was stated:

> Swarthout was President and Chief Operating Officer of Taylor Wine from January, 1975, until April 1, 1981 at which time Coca-Cola asked him to take early retirement.

[A3] Elsewhere in the Report it was stated:

> There was no sweetheart deal; . . . In fact, Swarthout was " given" early retirement by Coca-Cola approximately eighteen months after the merger. (Teasley Dep., pp. 43-44, 175-77).

[A26]

In fact, Mr. Swarthout was asked to take early retirement in the fall of 1978, and remained President until 1981 even though Mr. Killeen testified that his management proved inept.

The courts below also excused the failure to disclose Mr. Swarthout's secretly leaking the bidding information to Coca-Cola that he had received from Lincoln Bank on the ground that the leaking of inside information is only prohibited when there is insider trading. Thus it was stated in the Report:

> The essence of Rule 10b-5 is that anyone trading *for his own account* in the securities of a corporation who has " access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone" may not take "advantage of such information knowing it is unavailable to those with whom he is dealing."
>
> * * *
>
> First of all, it is clear that this case has nothing whatsoever to do with insider trading for personal profit.

[A28]

The report overlooks that in *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc) cert denied sub nom *Coates v. SEC*,394 U.S. 976 (1969) the Second Circuit held that it was not just trading on inside information, but " recommending the securities concerned" while in possession of undisclosed inside information that is forbidden by the rule.

The Report also sought to excuse the failure to disclose the alteration of the copy of the Lincoln Bank Coca-Cola agreement submitted to the SEC in the course of its investigation and the giving of false testimony as a non issue.[A36] But even if stockholders may not have understood the significance of the provision that was concealed from the SEC, the existence of a coverup would have been understood. The existence of facts showing a

coverup is even more serious than the contract provision that was concealed. In *Weisberg v. Coastal State Gas Corp.* 609 F.2d 650,653,(2d Cir. 1979) the Second Circuit observed:

> Furthermore, plaintiff's allegations of a coverup of the alleged bribes enhances the prospect that she will succeed in demonstrating materiality, since we believe that shareholders, in deciding which directors to elect would consider such conduct, if it occurred, more important than the initial authorization of the payments.

THE DECISION BY THE SECOND CIRCUIT, HOLDING THAT PLAINTIFF COULD NOT PROVE DAMAGES BECAUSE TAYLOR WINE REFUSED TO NEGOTIATE WITH ANY OTHER PARTY, IS IN DIRECT CONFLICT WITH THE DECISION IN *STATE OF NEW YORK V. HENDRICKSON BROTHERS* BY ANOTHER PANEL OF THE SECOND CIRCUIT FOLLOWING THIS COURT'S DECISION IN *BIGELOW V. RKO RADIO PICTURES* AND SHOULD BE REVIEWED BY A WRIT OF CERTIORARI AND REVERSED, OR REMANDED FOR RECONSIDERATION.

It was the defendants who created the conditions which resulted in no formal merger offers being made and no tender offers being made. It was Mr. Swarthout who told all the potential suitors that Taylor Wine was not interested in merging with anyone. In the period prior to October 13, 1976 when it was most likely that a tender offer would have succeeded, that Coca-Cola to forsestall a tender offer choose not to file a timely Schedule 13D which would have made disclosure of the floor price of the Lincoln Bank deal or to issue a press release disclosing the floor price of its deal with Lincoln Bank. The failure of Coca-Cola to make the required disclosure blinded the market at the critical moment. The lower courts in holding that plaintiff could not establish damages held:

> Plaintiff would have this court, if it found liability on the part of the defendants, calculate damages based on what other companies might have, but did not offer either for the purchase of the Lincoln stock or in connection with a full-fledged merger with Taylor Wine.

[A33-A34]

This ruling is in direct conflict with the very recent decision by another panel of the Second Circuit in *State of New York v. Hendrickson Brothers, Inc.*, 840 F.2d 1065 (2d Cir. February 16, 1988) which followed this Court's decision in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946). In *State of New York v. Hendrickson Brothers, Inc.* the Court held:

> The normal frame of reference for "what would have been paid is the market value of the goods or services in the absence of the collusive action. Where, however, there is a dearth of market information unaffected by the collusive action of the defendants, the plaintiff's burden of proving damages is to an extent, lightened for "it would be a perversion of fundamental principles of justice to deny all relief to the injured person and thereby relive the wrongdoers from making any amend for his acts."*Story Parchment Co. v. Paterson v. Paterson Parchment Paper Co.*, 282 U.S. 555,563 (1931); *see J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 568;*Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946). Although the jury is not allowed to base its damages assessment on speculation or guesswork it is entitled to
>
> > make a just and reasonable estimate of the damage based on relevant data, and render its verdict [accordingly. In such circumstances juries are allowed to] act on probable and inferential as well as upon direct and positive proof."...Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
> >
> > The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

> *Id.* at 264 (quoting *Story Parchment Co. v. Paterson v. Paterson Parchment Paper Co.*, 282 U.S. at 564) *see J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 566-67 ("it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted')(quoting *Hetzel v. Baltimore & Ohio Railroad Co.*, 169 U.S. 26,39 (1898)).

(840F.2d at 1077-78)

In view of the conflict between the decisions of the court below, not only with *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946) but the very recent decision of another panel of the Second Circuit in *State of New York v. Hendrickson Brothers, Inc.*, 840 F.2d 1065, 1077-78 (2d Cir. February 16, 1988) the decision of the Court below should be reviewed by writ of certiorari and reversed, or in the alternative, remanded to the Second Circuit for reconsideration in light of the conflict with another panel of that circuit.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit or in the alternative this case should be remanded to the United States Court of Appeals for the Second Circuit for reconsideration in light of *Basic Incorporated v. Levinson* U.S. , 108 S.Ct. 978, 99 L.Ed.2d 194 (March 7

Respectfully submitted

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WALTER S. TAYLOR,

Plaintiff,

v.

TAYLOR WINE CO., INC.; JOSEPH L. SWARTHOUT; SHERMAN FARNHAM; ALEXANDER D. HARGRAVE; COCA-COLA COMPANY; and LINCOLN FIRST BANK OF ROCHESTER.

Defendants.

REPORT AND RECCOMENDATION

By order dated September 13, 1985, United States District Judge John T. Curtin referred all motions for summary judgment to the undersigned for disposition pursuant to 28 U.S.C. §636 (b)(1)(B). For the reasons that follow,it is my Report and Recommendation that defendants' motions for summary judgment be granted. Accordingly, plaintiff's individual claims under 10(b), 13(d), and 14(a) of the Securities and Exchange Act of 1934 (the "Act") [15 U.S.C. §§78j(b), 78m(d), and 78n(a)] and Rules 10b-5,13d-1,and 14a-9[17C.F.R.§§240.10b-5,240.13d-1,and240.14a-9] should be dismissed with prejudice; plaintiff's class claim under 14(a) should be dismissed with prejudice; and, the Court should decline to exercise pendent jurisdiction over the remaining state law claims.

Procedural Background

Plaintiff commenced this action on February 5, 1981 in the United States District Court for the Southern District of New York. By order of United States District Judge Charles S. Haight dated July 27, 1983, the case was transferred to the Western District of New York. United States District Judge Michael A. Telesca was assigned the case, and he referred all matters relating to discovery to the undersigned on August 23, 1984.

On August 17, 1984, Judge Telesca certified plaintiff as the class representative in connection with the cause of action under §14(a). No other cause of action was certified as a class claim. Plaintiff has individual claims against defendants for violations of §§10(b), 13(d), 14(a), and for violations of New York State fiduciary obligations.

On August 29, 1985, Judge Telesca recused himself from the case. The case was reassigned to Chief Judge John T. Curtin, who, in an order dated September 13, 1985, directed that the undersigned hear and report on any motions for summary judgment.

On October 11, 1985, all defendants filed a joint motion for summary judgment. On the same day, defendants Alexander Hargrave, Sherman Farnham, and Lincoln First Bank of Rochester also filed separate motions for summary judgment. Plaintiff did not file a cross motion for summary judgment. On February 7, 1986, this court heard oral argument on defendants' motions for summary judgment.

Parties to the Action

A brief review of the parties to the action will serve as a useful backdrop to this most contentious litigation.

Plaintiff, Walter S. Taylor, Jr., is the grandson of the founder of Taylor Wine. At the time of the events in question, Walter Taylor was the record holder of approximately 102 shares of Taylor Wine common stock and was a beneficial owner of Taylor Wine common stock pursuant to the terms of Harriett Taylor's will.

Prior to 1970, plaintiff was employed by Taylor Wine. After his departure from Taylor Wine, plaintiff founded the Bully Hill Vineyards, Inc., in Hammondsport, New York. Plaintiff has previously been engaged in litigation concerning the use of the Taylor name as a trademark.

At the time of the merger with The Coca-Cola Company ("Coca-Cola"), defendant Taylor Wine Company ("Taylor Wine") was a New York-based producer of premium still and sparkling wines that were marketed under the "Taylor" and "Great Western" labels. Its corporate headquarters and winery are located near Hammondsport, New York. Until 1962, Taylor Wine was a close-

ly held company. In January, 1977, Taylor Wine merged with Coca-Cola. It is this merger that spawned the instant litigation.

Defendant Joseph Swarthout ("Swarthout") was employed by Taylor Wine from April 1, 1946 until April 1, 1981. Swarthout was President and Chief Operating Officer of Taylor Wine from January, 1975, until April 1, 1981 at which time Coca-Cola asked him to take early retirement.

Defendant Sherman Farnham ("Farnham") was a director of Taylor Wine from 1962 until September 23, 1976, and again from January 21, 1977 until 1980. Farnham was a partner in the law firm of Nixon, Hargrave, Devans, Doyle ("Nixon, Hargrave"), counsel to Taylor Wine, until 1980, and sat on the Board of Directors of Lincoln First Bank, Inc., the holding company of defendant Lincoln First Bank of Rochester. Farnham is the brother-in-law of defendant Alexander Hargrave.

Defendant Lincoln First Bank of Rochester ("Lincoln") was a wholly owned subsidiary of the bank holding company, Lincoln First Bank, Inc. Lincoln was one of the major lenders to Taylor Wine. At the time of the merger between Taylor Wine and Coca-Cola, Lincoln was the principal stockholder of Taylor Wine. As of November 5, 1976, Lincoln held of record, but not beneficially, as trustee under certain trusts and in various other fiduciary capacities a total of 1,183,391 shares of Taylor Wine common stock, or approximately 27% of the total shares then outstanding. [Proxy Statement and Prospectus ("Proxy Statement"), issued by the Taylor Wine Company and the Coca-Cola Company on December 2, 1976, p. 9. The cover page and pages 3, 4, 5, 6 and 9 of the Proxy Statement are annexed to this Report in an Appendix.].

In 1976, defendant Alexander Hargrave ("Hargrave") was the President and Chairman of the Board of Lincoln First Bank, Inc., and was Vice-Chairman of defendant Lincoln. Prior to 1974, Hargrave was President of defendant Lincoln. Hargrave joined Lincoln in 1963 as Executive Vice-President after approximately 15 years with the law firm of Nixon, Hargrave. Hargrave was a member of the Board of Directors of Taylor Wine from the mid-1960s until September 223, 1976. Hargrave is the brother-in-law of defendant Farnham.

Coca-Cola is a Delaware corporation with its corporate headquarters located in Atlanta, Georgia. Coca-Cola is a publicly traded company whose stock is listed on the New York Stock Exchange, and in 1976 and 1977 was engaged principally in the manufacture and sale of beverages.

Plaintiff's Claims

This case arises out of the circumstances leading up to, and the eventual merger of Taylor Wine with Coca-Cola on January 20, 1977. Plaintiff alleges that Taylor Wine, Swarthout, Farnham, Hargrave, Lincoln, and Coca-Cola violated §§10(b), 13(d), and 14(a).

In his first cause of action, plaintiff alleges that defendants violated 10(b) and 14(a) by omitting from the Proxy Statement certain material facts relating to Lincoln's sale of a portion of its Taylor Wine stockholdings and by failing to disclose certain conduct of defendants, particularly Swarthout, in connection with that sale. Only the 14(a) claim is advanced on behalf of the certified class.

Plaintiff's second cause of action alleges that the defendants violated 10(b) when Swarthout advised Coca-Cola to increase its bid for the Lincoln stock and Coca-Cola thereafter did not disclose this allegedly material inside information in connection with the solicitation of the Taylor Wine shareholders' approval of the merger.

In his third cause of action, plaintiff alleges that Taylor Wine, Swarthout, Farnham, and Hargrave violated §13(d) by failing to file a Schedule 13D as required by 17 C.F.R. §240.13D-101; that Coca-Cola violated §13(d) by failing to file a timely Schedule 13D and by omitting the terms of its agreement for the purchase of the Lincoln stock; and, that Lincoln violated §13(d) by also omitting the terms of this agreement.

Plaintiff's fourth cause of action apparently alleges a violation of §10(b). Plaintiff alleges that the defendants acted together to prevent any tender offers for the Taylor Wine stock following the agreement between Coca-Cola and Lincoln.

Plaintiff's fifth, sixth, and seventh causes of action are pendent state claims that allege the breach of various state fiduciary obligations by defendants.

Statement of Facts

For purposes of this litigation, this Court's review of the historical facts begins with the death of Clarence Taylor, the last surviving son of the founder of Taylor Wine. At the time of his death on January 22, 1976, Clarence Taylor was a major stockholder of Taylor Wine. After his death, Lincoln held the stock as executor of the Clarence Taylor estate. [Plaintiff's Response to Requests for Admissions ("Plaintiff's Admissions"), No. 2; Deposition of James McBride ("McBride Dep.") filed August 6, 1985, p.25].

Early in 1976, Donald Easterly, a Lincoln Bank trust officer in charge of administering estate accounts for Lincoln Bank, determined that a portion of the Taylor Wine stock in this estate needed to be sold to meet the tax requirements of the estate. (Deposition of Donald Easterly [Easterly Dep."], pp. 12-13). An informal committee of six trust officers, including outside counsel for the Clarence Taylor estate, Harter, Secrest & Emery, was formed to discuss the alternatives for disposition of the Taylor Wine stock in the Clarence Taylor estate ("Clarence Taylor stock"). (Deposition of James White ["White Dep."], pp. 40, 90; McBride Dep., p. 32). Counsel for the estate recommended three alternatives for disposition: a secondary offering, a Rule 144 sale, or a private placement. (White Dep., pp. 52, 59).

Joseph Swarthout, President of Taylor Wine, was informed of this situation in March or April of 1976 by both James McBride, manager of the Personal Trust Department of Lincoln Bank, and James White, the Executive Vice-President in charge of the Investment Management Group of Lincoln Bank. (McBride Dep., 85-86; White Dep., p. 74). During the course of the next few months, Swarthout participated in a number of discussions with the Lincoln Bank Trust Department regarding the disposition of this stock. (Deposition of Joseph Swarthout. ["Swarthout Dep."], p. 147; McBride Dep., p. 89; White Dep., p. 74).

Taylor Wine considered buying back the Clarence Taylor stock but eventually decided against doing so (Swarthout Dep., p. 148).

In early April of 1976, Lincoln attempted to sell approximately 150,000 shares of the Clarence Taylor stock. However, the sale was not sufficiently successful to meet the tax requirements of the estate and it was discontinued. (Deposition of Ellison Patterson, [Patterson Dep.:]), pp. 63-72).

It is undisputed that Swarthout and the Taylor Wine Board were aware of the possible sale of the Clarence Taylor stock. Swarthout stated that he recalls the Taylor Wine Board discussing the possibility of that stock being sold in a block (Swarthout Dep., p. 184) and that, based on advice from counsel, he expressed concern to the Lincoln Trust officers that Lincoln's holdings of Taylor Wine stock might be sold to a company that would jeopardize Taylor Wine's ability to do business. (Swarthout Dep., p. 235; White Dep., pp. 88-94). It is clear that Swarthout attended at least three meetings with Lincoln Trust representatives at which the disposition of the Clarence Taylor stock was discussed. (McBride Dep., pp. 85, 89-92, 179; White Dep., p. 101).

In early August of 1976, Lincoln approached the Taylor Wine Board and asked it to file the appropriate papers with the Securities and Exchange Commission (SEC) for a secondary offering of 603,648[1] shares of Taylor Wine common stock it held under various trusts and estates (Lincoln Block"). On August 6, 1976, Taylor Wine filed an S-7 Registration Statement for a secondary offering of the Lincoln Block. (Plaintiff's Admissions, No. 1).

Shortly thereafter, the management of Taylor Wine met with representatives of Coca-Cola (Deposition of Harry Teasley ["Teasley Dep."], pp. 9-10 and Ex. 22). This meeting had been arranged by White, Weld & Company, financial advisors to Coca-Cola, in mid-July of 1976. (Exhibit C -- "White, Weld/Taylor Visit" -- Affidavit of Avrom S. Fischer, signed December 31, 1985 [Fischer Aff."]). A representative of White, Weld had contacted Taylor Wine directors Farnham and Hargrave to investigate the possibility of a meeting with Taylor Wine. (*Id.*). At that point in time, Coca-Cola, which was interested in entering the domestic wine industry, had already determined that Taylor Wine was its most attractive entry vehicle into the wine industry. (Ex. C --

"Acquisition Proposal: The Taylor Wine Company" -- Fischer Aff.). At the meeting, Swarthout stated that Taylor Wine was not interested in merging with any company at that time. Coca-Cola did not press its acquisition interests and the meeting was generally a get-acquainted meeting between Taylor Wine management and Coca-Cola management. Activities included a tour of the Taylor Wine facilities in Hammondsport. (Swarthout Dep., pp. 306-14; Ex. 31, Teasley Dep., pp. 14-16).

On August 13, 1976, Allen & Company contacted the Lincoln Trust Department and informed it that they had a client who was interested in purchasing the Lincoln Block, but refused to identify the client. On August 25, Allen & Company made a verbal offer of $15 per share on behalf of this undisclosed client for all of the shares of the Lincoln Block. This offer was never presented in written form. (McBride Dep., p. 246).

On August 27, Lazard Freres submitted an offer of $15 per share on behalf of undisclosed clients. (McBride Dep., pp. 242-43; Plaintiff's Admissions, No. 10). Lincoln informed Swarthout of this offer (McBride Dep., pp. 252-53) and he indicated he had already received a copy of it. (*Id.*).

At this time, it became apparent to Swarthout that the secondary public offering was not going to be successful and that the Lincoln Block would most likely be sold in a private sale as a block. (Swarthout Dep., p. 359). As a result, he contacted a number of different companies who, over the years, had expressed an interest in Taylor Wine. He called Quaker Oats, Heinz, Norton Simon, Coca-Cola, Standard Brands, and Beatrice Foods. (Swarthout Dep., p. 377). Swarthout informed these companies that Lincoln would most likely be selling these stocks as a block and indicated that it they were still interested in a merger with Taylor Wine, they should consider submitting a bid for the stock, (*Id.*, pp. 376-78).

From August 27 through September 8, Lincoln Bank received a number of written offers for the Lincoln Block, as set forth below.

1. August 26, 1976, Lazard Freres submitted a bid of $15 per share on behalf of Marne Obernauer and IFI Intl. S.A. The bid was for a minimum of 500,000 shares and parties were willing to purchase the remaining 310.976 shares held by Lincoln. (Plaintiff's Admissions, No. 10).

2. August 31, 1976, Beatrice Foods submitted a bid of $15.10 per share. The minimum purchase price was 603,000 shares, but Beatrice was willing to purchase up to 914,624 shares. (Plaintiff's Admissions, No. 16).

3. August 31, 1976, Coca-Cola submitted a bid of $15.25 per share. In its bid, Coca-Cola stated its willingness to purchase 603,648 shares at $15.25 per share if 90 days after acceptance of the offer a merger agreement with Taylor Wine had not been reached. During the initial 90-day period, Lincoln would agree not to sell any of the 914,624 shares. (Plaintiff's Admission, No. 30).

4. August 31, 1976, Norton Simon submitted a bid of $20 per share for 603,648 shares. Those shares would be delivered into a voting trust entered into between Norton Simon and Lincoln. The shares would be redelivered to Norton Simon upon the repeal of §76(2) of New York Alcoholic Beverage Control Law. (Plaintiff's Admissions, Nos. 20, 21).

5. September 7, 1976, Lazard Freres increased its bid to $17 per share.

6. September 8, 1976, Pepsico submitted a bid of a price per share equal to the greater of $18.01 or $.10 above any other bona fide written offer, not to exceed $20.13 per share. Pepsico's minimum purchase was 603,648 shares and was willing to purchase all shares held by Lincoln. (Plaintiff's Admissions, Nos. 33, 34).

7. September 8, 1976, Coca-Cola increased the floor price of its offer to $18.07 per share. (Plaintiff's Admissions, No. 46).

On August 31, Herman A. Schaefer, Executive Vice-President for Finance and Administration at Pepsico, called James McBride, a trust officer of Lincoln, regarding the sale of the Lincoln Block. Schaefer indicated that Pepsico was interested in making an offer for the stock. (Affidavit of Herman A. Schaefer,

signed September 24, 1985 [Schaefer Aff."], Ex. 1 -- Testimony before SEC on October 4, 1976, pp. 20-23). During the conversation, McBride told Schaefer that Lincoln would discuss the matter of the bids with Taylor Wine. (*Id.*). Schaefer contacted Farnham who suggested that he speak with Swarthout. Swarthout returned Schaefer's call on August 31 and a meeting with Pepsico officials was arranged for September 2.

Prior to meeting with the management of Taylor Wine on September 2, Pepsico officials met with McBride to discuss generally the ground rules for the sale of the Lincoln Block. Schaefer stated in testimony before the SEC that McBride made no statements regarding the confidentiality of any offer. (*Id.*, at 15, 21).

At this meeting, McBride told Schaefer that, based on discussions with outside counsel, Harter, Secrest and with Merrill, Lynch, Pierce, Fenner and Smith ("Merrill, Lynch"), Lincoln had serious concerns about the ability of Pepsico to secure the necessary regulatory approval for the acquisition of this stock in light of its wine ownership interests in Yago 'Sant Gria and Monsieur Henri. (McBride Dep., pp. 334-35, 339-40, 349-50, 613). In fact, Taylor Wine's outside counsel, Nixon, Hargrave, advised Harter, Secrest that, in its opinion, sale to Pepsico would raise serious anti-trust problems, and, that, if necessary, Taylor Wine would take all necessary legal action to block such a sale. (McBride Dep., pp. 643-46).

In a similar vein, Harter, Secrest had also advised Lincoln against acceptance of the Norton Simon offer, which required delivery of the stock into a voting trust. In the opinion of Harter, Secrest, such an arrangement could jeopardize Taylor Wine's licenses because it was intended to circumvent the statutory prohibition in §76(2) of the New York Alcoholic Beverage Control Law. (McBride Dep., pp. 640-42; White Dep., 135, 150-53, 155, 188-90).

Later that day, September 2, Schaefer met with Swarthout in Hammondsport. (Schaefer Aff., Ex. 1, pp. 21-25). The general purpose of the meeting was to meet Swarthout and acquaint him with Pepsico. Schaefer gave an overview of the general corporate and management structure of Pepsico. Schaefer characterized

his overture to Swarthout as a "soft approach". (*Id.*, p. 23). During this meeting, as recounted by Schaefer, Swarthout indicated that Taylor Wine did not want to merge with anyone at that time, although Swarthout did not rule out such a possibility six or nine months down the road after the parties had become acquainted with one another. (*Id.*, p. 24).

On Labor Day, Monday, September 6, 1976, Swarthout met with Harry Teasley and other Coca-Cola officials in Hammondsport. (Teasley Dep., p. 9 and Ex. 12, 29). Swarthout indicated to Coca-Cola that the bank had received other substantial offers for the Lincoln Block. The parties generally discussed the possibility of a merger between Coca-Cola and Taylor Wine.

The next day, Teasley met with the trust officers at Lincoln. (Teasley Dep., pp. 111-112). Following that meeting, Teasley had the impression that Lincoln had received some substantial offers that were higher than Coca-Cola's offer of $15.25. (Ex. 31 to Teasley Dep., pp. 36-37).

The same day, September 7, the Taylor Wine Board met in Rochester. The Board discussed the companies that it understood were interested in purchasing the Lincoln Block. Ned Roman of Nixon, Hargrave, counsel to Taylor Wine, discussed procedures that would be followed in the event of an unilateral tender offer that the Board did not believe was in the best interest of Taylor Wine. Representatives of the investment banking firm of First Boston Corporation ("First Boston") presented their analysis of stock. (Affidavit of Michael D. Linehan, filed 1985 ["Linehan Aff."]). Based on First Boston's analysis of business style/compatibility and financial capability, Coca-Cola ranked first in each category. (Deposition of Frederick M. Smith, ["Smith Dep."], pp. 86-87 and Ex. 5 [last page of Schedule VII]).The next day, Wednesday, September 8, the Taylor Wine Board again met, commencing at 9:20 a.m. As reflected in the minutes of the meeting, (Linehan Aff.), James White, Executive Vice-President in charge of the Investment Management Group of Lincoln, was present at the opening of the meeting and discussed Lincoln's position with regard to the sale of the Lincoln Block. White stated that the Bank had an obligation to accept the best price for the selling shareholders provided that the sale would not have

a substantial adverse impact on the other fiduciary accounts that would continue to hold Taylor Wine stock. (Linehan Aff.). White also stated that Lincoln wished to avoid selling the stock to any company that might be detrimental to the interests of Taylor Wine, particularly sale to any company that might jeopardize the alcoholic beverage licenses of Taylor Wine or might result in other legal problems. (Swarthout Dep., pp. 461-65). Swarthout left the Board meeting and went to White's office. White and Swarthout discussed generally the bids that had been received up to that point. Swarthout recalled that White generally apprised him of the terms of the bids. (*Id.*). Swarthout returned to the Board meeting and advised the Board of his conversation with White. (*Id.*, p. 469).

After lunch, Swarthout received another telephone call from White. Swarthout again met with White in White's office. (*Id.*, at 473). As recounted by Swarthout, the substance of the conversation was that if Coca-Cola was to be the successful bidder, they would have to raise the floor price of their bid. (*Id.*, at p. 484). Swarthout recalled that White indicated that the Coca-Cola bid would have to be above $18 per share. (*Id.*, at 478). Swarthout returned to the Taylor Wine Board meeting and related this conversation to the Board. Swarthout stated that the Board unanimously agreed that Coca-Cola should be advised of the need to increase its bid (*Id.*, pp. 477, 479).

Swarthout left the Board meeting, spoke with Farnham, (*Id.*, at 479), and went across the street to the hotel at which Teasley and other Coca-Cola representatives were staying. (*Id.* at 480). Swarthout met privately with Teasley and told him that Coca-Cola would have to raise its bid to something over $18 per share to be successful. (*Id.* at 490). Swarthout stated that he did not specifically tell Teasley the amounts of the other bids, but generally indicated that the Coca-Cola bid should be above $18 per share (*Id.* at pp. 490-491). At his deposition, Teasley confirmed the substance of this conversation. (Teasley Dep., pp. 12-18, 142).

Shortly after this conversation, Teasley sought and received authorization to raise Coca-Cola's bid from $15.25 to $18.07 per share, (Teasley Dep., pp. 138, 142), and communicated this

change to the Lincoln Trust officers. (Teasley Dep., pp. 138-139).

The Lincoln Trust Department's review of the various bids was based upon an individual analysis of the relative strengths and weaknesses of the bidding companies and the terms of their respective bids. (McBride Dep., pp. 567-68).

[O]n the advice of counsel as to impediments to sale . . . we were making a decision that Coca-Cola had significantly less impediments, in fact none that we could identify, than Pepsico. Pepsico did not even rank in the top three offers. We had determined at that point in time that we would like to have a tax-free stock exchange, that it would benefit both the selling shareholders and those shareholders who would remain. We had made a judgment in terms of what counsel had advised us, that we would most satisfactorily fulfill our [fiduciary] obligations to both the selling shareholders and those shareholders who remained by selecting the Coca-Cola Company.

(*Id.*).

Late in the afternoon on September 8, Lincoln informed Teasley that it had accepted Coca-Cola's bid.[2] (Plaintiff's Admission, No. 47; Teasley Dep., p. 139).

The Taylor Wine Board was advised by Lincoln in the afternoon that Lincoln had accepted Coca-Cola's offer (Linehan Affidavit). On that day, the Taylor Wine Board authorized the appropriate corporate officers to enter into formal negotiations with Coca-Cola regarding the possible merger between the two companies. (*Id.*). That same day, September 8, 1976, Taylor Wine issued a press release announcing that the two companies had entered into negotiations concerning a possible merger and that, in a related development, Lincoln and Coca-Cola had reached an agreement with respect to the sale of the Lincoln stock. (Plaintiff's Admissions, No. 52).

Merger Negotiations

On September 12 and 13, 1976, representatives of Taylor Wine and Coca-Cola met in Hammondsport to begin merger negotiations (Teasley Dep., p. 20; Exhibit 22, Deposition of Albert Killeen ["Killeen Dep."]). The principal negotiators were

Swarthout for Taylor Wine and Killeen and Teasley for Coca-Cola. At this meeting, the parties discussed the form of the proposed merger and a first draft of an agreement and plan for merger was presented by Coca-Cola's outside counsel, Simpson, Thacher & Bartlett. The parties generally discussed the financial status of the two companies, employee benefit programs, sales and financial analyses, and the constituency of the Taylor Wine Board of Directors following the merger. (*Id.*). The parties also discussed management contracts. Coca-Cola stated that it had a corporate policy against such contracts and Swarthout agreed with that policy. (*Id.*).

Following this meeting, Teasley received a letter from White, Weld, Coca-Cola's financial advisor, regarding price negotiations with Taylor Wine management. White, Weld opined that an exchange could be negotiated in the area of $22 per share, but that Teasley should be prepared to seek authorization to go higher in the event of a price stalemate. (Ex. 3, Teasley Dep.). White, Weld stated that Taylor Wine's financial advisor, First Boston, would probably advise Taylor Wine to begin negotiations in the area of $26.03 per share, based upon recent earnings. (*Id.*). White, Weld also advised Teasley that Coca-Cola could justify a price somewhat in excess of $22.00 per share, (*Id.*), which Coca-Cola had determined was its absolute "walk away" price. (Killeen Dep., p. 222 and Ex. 1; Teasley Dep., p. 21 and Ex. 2).

On September 24, 1976, the parties met in New York City. Coca-Cola gave the initial presentation and offered $19 per share. (Teasley Dep., pp. 31-32). In response, Swarthout said that he had planned to ask $30 per share. Teasley reminded Swarthout that in early September he told Swarthout that Coca-Cola was not interested in purchasing the Lincoln shares at such a price. (*Id.*, pp. 32-33). Nevertheless, Swarthout's demand at this first session was for $26 per share. (*Id.*, p. 33).

Following this meeting, representatives of Coca-Cola and Taylor Wine continued their discussions and negotiations. Over the course of the next three weeks Coca-Cola raised its bid to $21.375 and then to $22; Taylor Wine, in turn, reduced its asking price to $23.62 and then to $23 (Deposition of Grant Curtis, ["Curtis Dep."], pp. 237-244; Ex. 14, Teasley Dep.).

During early October, Teasley sought authority from Coca-Cola management to offer up to $23 per share for the Taylor Wine stock. (Ex. C, Fischer Aff.). In the week prior to the October 14, 1976 meeting, the negotiations had reached a stalemate: Coca-Cola offered $22 and Taylor Wine asked $23. (Curtis Dep., p. 245). When the parties met on October 14, Killeen presented Coca-Cola's "final offer" of 3.75 Taylor shares for 1 Coca-Cola share, which, as of that date, equaled $22.33 per share. (Plaintiff's Admissions, No. 63). Swarthout consulted with his staff and accepted the offer.

A press release was issued that day announcing that the parties had reached an agreement in principle to merge. (Plaintiff's Admissions, Nos. 65, 66). The press release stated that the exchange ratio of 3.75 shares of Taylor Wine stock for 1 share of Coca-Cola stock was subject to the approval of the Board of Directors of both companies and to the approval of two-thirds of the stockholders of Taylor Wine. (*Id.*; Ex. 11, Defendants' Requests for Admissions). Following the October 14th verbal agreement, the law firm of Simpson, Thacher & Bartlett began preparation of the Proxy Statement for Coca-Cola and Taylor Wine (Plaintiff's Admissions, No. 69). On October 29, Coca-Cola and Taylor Wine signed the formal written Agreement and Plan of Merger. (Plaintiff's Admissions, No. 70).

On November 12, 1976, Taylor Wine filed with the SEC a draft Proxy Statement, which included the Agreement and Plan of Merger signed on October 29, 1976. (Plaintiff's Admissions, No. 70). The SEC declared the Proxy Statement effective, (Plaintiff's Admissions, No. 75 and 76), and it was issued to the Taylor Wine stockholders on December 2, 1976.

On January 20, 1977, over 98 percent of the shareholders of Taylor Wine voted in the favor of the merger with Coca-Cola - -3,551,293 to 54,465. (Plaintiff's Admissions No., 93). Only 12 of the 7,200 Taylor Wine shareholders requested cash in lieu of the stock, pursuant to 623 of the New York Business Corporation Law. (Plaintiff's Admissions, No. 94). On January 21, 1977, the date of the closing of the merger, each Taylor Wine stockholder received $20.30 worth of Coca-Cola stock for each share of Taylor Wine stock. (Plaintiff's Admissions, No. 96).

During the time that Coca-Cola and Taylor Wine were engaged in merger negotiations, the SEC conducted an investigation into the trading of the securities of Taylor Wine. On September 16, 1976, the SEC Division of Enforcement issued a formal order of investigation concerning "Trading in the Securities Taylor Wine Co., Inc." (File No. HO-965). (Ex. A, Fischer Affidavit). The purpose of this review was to investigate for possible violations of §§ 10(b), 13(d), and 14(e) in connection with the agreement between Coca-Cola and Lincoln Bank. (*Id.*). The investigation focused on Coca-Cola's failure to file a Schedule 13D[3] after it reached an agreement on September 8, 1976 with Lincoln regarding the Lincoln Block.

After investigating the circumstances leading up to the agreement between Coca-Cola and Lincoln, and taking testimony from officers of Coca-Cola, Lincoln, Taylor Wine, and Pepsico, the SEC concluded that Coca-Cola had committed a technical violation of 13(d) and Rule 13d-1- by disclaiming beneficial ownership of the Lincoln stock. (Ex. A., Fischer Aff.).

Coca-Cola claimed that although it filed the required Schedule 13D on November 12, 1976, it was justified in disclaiming beneficial ownership of the stock because the actual purchase of the Lincoln Block would not occur for at least 90 days, and, if a merger occurred prior to that time, the sale would not occur at all except according to the merger terms. The SEC disagreed and directed the filing of an amended 13D Schedule. (It should be noted that shortly after this dispute with Coca-Cola, the SEC modified Rule 13d-4 [17 C.F.R. 240.13d-4] to allow a purchaser such as Coca-Cola to disclaim beneficial ownership in circumstances similar to those in this case.) After a thorough investigation, correction of this technical violation was the only action taken by the SEC in connection with this entire matter. Coca-Cola consented to the SEC's finding and filed an amended Schedule 13D that deleted all disclaimers of beneficial ownership in the Lincoln Block.

LEGAL DISCUSSION

A. Summary Judgment

The United States Supreme Court and the Second Circuit have recently restated and clarified the standards governing summary judgment under Fed. R. Civ. P. 56. *See Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2502 (1986); *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986). *See also, Matsushita Elec. Indus. Co. v. Zenith Radio*, 106 S. Ct. 1348 (1986); *Knight v. U.S. Fire Insurance Co.*, No. 86-7294, slip. op. at 181 (2d Cir. Oct. 22, 1986).

[The moving party] bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" which it believes demonstrate the absence of a genuine issue of material fact.

Celotex, 106 S. Ct. at 2553.

This burden is discharged by "'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Id.*, at 2554. The court is obligated to resolve and draw all *reasonable* inferences in favor of the party resisting the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Patrick v. LeFevre*, 745 F.2d 153, 158 (2d Cir. 1984); *Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757, 762 (2d Cir. 1983). Such inferences, however, must have some basis in fact. *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 (5th Cir.1978).

Once the moving party has made this showing, Rule 56(e) requires the nonmoving party to go beyond the pleadings and to designate "specific facts showing that there is a genuine issue for trial." Mere speculation that an issue of material fact exists is not enough to defeat a Rule 56 summary judgment motion. *Knight*, slip. op. at 185; *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985) (*per curiam*); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 444 (2d Cir. 1980). Material factual issues must be disputed with concrete particulars, *Dressler v. MV Sandpiper*, 331 F.2d 130, 133 (2d Cir. 1964), and more denials or general allegations without evidentiary support are insufficien' to defeat a summary judgment motion. *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469,473 (2d Cir. 1943).

"Similarly, a 'bare assertion that evidence to support a fanciful allegation lies within the exclusive control of the defendants, and can be obtained only through discovery, is not sufficient to defeat a motion for summary judgment.'" *Knight,* at 185, quoting *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 251 (2d Cir. 1985).

[Rule 56] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 106 S. Ct. at 2553.

The role of the court on a motion for summary judgment is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a *genuine factual issue for trial. Anderson, 106 S. Ct. at 2511; Patrick*, 745 F.2d at 158. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 106 S. Ct. at 2510 (emphasis in original).

The applicable substantive law identifies the facts that are material for purposes of summary judgment. *Id.*; see, e.g., *Knight,* slip. op. 1811, 188."Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 106 S. Ct. at 2510. A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 106 S. Ct. at 2510.

In the case before this court, there is no real dispute as to the historical facts that I have previously recited. The central issue in dispute in this case is whether certain facts that were omitted from the Proxy Statement were "material" facts that defendants were obligated by law to disclose.

This court is well aware that "materiality" for purposes of federal securities violations is a mixed question of law and fact,

involving the application of a legal standard to a particular set of facts. As the Supreme Court state in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976), the underlying objective facts in cases such as this will often be free from dispute, but these facts are merely the starting point for the ultimate determination of materiality.

> [This] determination requires delicate assessments of the inferences "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact. [footnote omitted]. Only if the established omissions are "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality" is the ultimate issue of materiality appropriately resolved as a matter of law by summary judgment.

TSC Industries, 426 U.S. at 450, quoting *Johns Hopkins Univ. v. Hutton*, 422 F.2d 1124, 1129 (4th Cir. 1970).

Before discussing plaintiff's claims further, it is well to recall the Supreme Court's recent statement concerning a defendant's right to summary judgment in appropriate cases.

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial that the claims and defenses have no factual basis.

Celotex, 106 S. Ct. at 2555.

Mindful of the above guidelines, I am convinced that the facts of this case mandate the entry of summary judgment for defendants.

B. First Cause of Action -- Omission of Material Information

Plaintiff's[4] first cause of action against defendants Taylor Wine, Coca-Cola, Lincoln Bank, Swarthout, Farnham, and Hargrave,[5] is based on an alleged violation of 14 (a) of the Act and Rule 14a-9[6] as well as 10(b) of the Act and Rule 10b-5.[7]

Plaintiff claims that defendants[8] omitted certain material information from the Proxy Statement which rendered it false and misleading. The issue is the materiality of the omitted informa-

tion. Under 10(b) and 14(a) a corporation is only required to disclose *material* facts. "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries,* 426 U.S. at 449. There must be a substantial likelihood that the disclosure of the omitted material would have been viewed by a reasonable investor as having significantly altered the total mix of information made available. This objective standard is the same under either 10(b) or 14(a). *Goldberg v. Meridor,* 567 F.2d 209, 218-19, (2d Cir. 1977), *cert. denied,* 434 U.S. 1069 (1978).

Paragraph 22 of the complaint lists eight facts or circumstances the omission of which allegedly rendered the Proxy Statement false and misleading. As presented to the court in legal memoranda and at oral argument, (Transcript of Oral Argument, February 7, 1986, p. 72), the specific omissions fall into two categories: (1) facts relating to the sale of the Lincoln Block of stock; and (2) facts relating to the selfish motives of defendants to insure Taylor Wine's merger with Coca-Cola.

1. Sale of Lincoln Block -- Disclosure of Other Bids

The main event that triggered this litigation was the decision by Lincoln Bank Trust Department to sell a significant portion of Lincoln Bank's Taylor Wine stockholdings. There is no doubt that the Lincoln Trust Department received a number of bids for the stock and that it ultimately accepted the Coca-Cola offer.

Plaintiff's argument in a nutshell is that these other bids received by the Lincoln Bank Trust Department should have been disclosed in the Proxy Statement. Plaintiff claims that the precise details of bids made for the Lincoln Block to the Trust Department of Lincoln Bank -- a stockholder of Taylor Wine -- during the months of August and September 1976, should have been described in detail in the Proxy Statement issued in December 1976 in connection with the merger between one of these early bidders, Coca-Cola, and Taylor Wine.

In my view, to merely state the essence of plaintiff's claim -- something plaintiff has had no difficulty doing -- is to suggest the answer.

It is certainly not contested that several companies made preliminary offers to Lincoln concerning a large portion of its Taylor Wine stock. Because of the size of the block, Taylor Wine officials were properly concerned that such a potential sale could affect control and the very existence of Taylor Wine. Taylor Wine management pursued possible merger partners. The uncontradicted evidence shows that feelers were made to at least six large corporations concerning the purchase of the Lincoln Block and potential merger with Taylor Wine. (Swarthout Dep., pp.376-78). The evidence demonstrates that Taylor Wine management believed the best possible suitor was Coca-Cola. As will be discussed infra, this marriage was indeed very beneficial to Taylor Wine stockholders.

The decision by Lincoln Trust Department to accept the Coca-Cola offer was not made lightly or, as plaintiff would have the court believe, solely because of upon the preferences of Taylor Wine management. As previously discussed, Lincoln's counsel, Harter, Secrest, and its financial investment advisor, Merrill, Lynch, counseled against acceptance of either the Pepsico or Norton Simon bid.

In September 1976, Coca-Cola and Taylor Wine announced that they had entered into preliminary merger discussions. It cannot be emphasized too strongly that his was the *only merger proposal* submitted to Taylor Wine during this time.

Discussion concerning the terms of the merger continued for several months from September 1976 to December 1976 and the terms were memorialized in the Proxy Statement at issue here.

The Proxy Statement concerning the *merger* did not ignore the preliminary bids made to Lincoln Bank for the Lincoln stock back in September 1976 and it did indicate that some of those bidders had discussed possible merger with Taylor Wine.

The Proxy Statement reads as follows:

Background of Merger Proposal

In August 1976 Taylor filed a registration statement with the Securities and Exchange Commission with respect to a proposed secondary offering of 603,648 Taylor shares held by Lincoln First Bank of Rochester ("Lincoln") in various fiduciary capacities.

Following the announcement of the filing, several companies, including The Coca-Cola Company, offered to purchase the Lincoln shares and separately consulted with Taylor management regarding Taylor's willingness to discuss a possible merger should the offeror acquire the Lincoln shares. Taylor management and its Board of Directors investigated the possibility of ownership of a large block of Taylor shares by or a merger with each of these companies. Taylor then advised Lincoln that, in its view, serious antitrust or other legal problems could arise from the sale of the Lincoln block to certain of the companies and that, on the basis of its evaluation of the various companies, the interests of Taylor and its shareholders would be best served if the shares were to be sold to the Coca-Cola Company.

Proxy Statement, p. 5 (Appendix 1).

In my view, the Proxy Statement accurately reflected the objective facts as they occurred. Nothing more was required.

Plaintiff apparently misunderstands the duty of disclosure imposed by 100(b) and 14(a): only material facts need be disclosed. The materiality of omitted information must be assessed in light of the information disclosed and the omissions are measured against an objective[9] reasonable shareholder standard. *TSC Industries, 426 U.S. at 445.*

Disclosure of the identity of the other companies who made preliminary bids and the amount of the bids would not have significantly altered the total mix of information disclosed to a reasonable shareholder who was considering the merger proposal in January, 1977. The preliminary bid offers to the Lincoln Trust Department quite simply had nothing to do with the actual terms of the proposed merger between Coca-Cola and Taylor Wine. The Proxy Statement only concerned the merger.

The purpose of 14(a) is to insure that proxies are solicited with an explanation to the stockholder of the real nature of the question for which authority to cast his vote is sought. *TSC Industries,* 426 U.S. at 444; *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970); see H. R. Rep. No. 1383, 73rd Cong., 2d Sess. 14 (1934).

Coca-Cola was the only company to submit a merger proposal. None of the other companies ever presented Taylor Wine with any sort of specific merger offer either before, during, or after Coca-Cola and Taylor Wine reached their agreement to merge.

These other companies lost interest in Taylor Wine after September 8, 1976 when Coca-Cola and Taylor Wine announced the initiation of merger negotiations. An affidavit submitted by David Mahoney, CEO of Norton Simon confirms this. (Ex. B, Defendants' Motion for Summary Judgment). Similarly, Herman Schaefer, an official of Pepsico, states in his affidavit that after the Taylor Wine - Coca-Cola merger discussions were announced, Pepsico lost interest in Taylor Wine and declined to make a merger bid. (Ex. A, Defendants' Motion for Summary Judgment). The objective facts confirm this. Pepsico made no merger offer to Taylor Wine. In fact, Pepsico decided that the Coca-Cola price was higher than Pepsico wanted pay. (*Id.*). Taylor Wine received no other merger offers. Simply put, there was no other "merger" information in existence to pass on to the shareholders. Coca-Cola's merger offer was the only offer pending.

Based on the information disclosed in the Proxy Statement, a shareholder knew that other companies had made preliminary overtures to purchase some stock from Lincoln and that some of these companies had discussed possible merger. The stockholders were on notice and could have pursued this inquiry. Furthermore, the uncontradicted evidence is that the identities of the companies who approached Lincoln to purchase the Lincoln Block were reported in an article in *Business Week*, October 4, 1976, and later in an article in *Value Line*, January 19, 1977. (Plaintiff's Admissions, Nos. 89, 90; Exs. 17, 18, Defendants' Requests for Admissions). *Dixon v. Ladish Co.*, 597 F. Supp. 20, 32, (E.D. Wis. 1984) (no duty imposed on defendants to restate information in proxy statement which is publicized or widely known), *aff'd sub nom. Kademian v. Ladish Co.*, 792 F.2d 614 (7th Cir. 1986).

Plaintiff would have this court believe that there was some sort of nefarious plot to "blind" these other companies and the market to the true nature of the agreement between Coca-Cola and Lincoln so that other companies were prevented from making

a merger or tender offer. However, this court must deal with facts, not fancied conspiratorial plots lacking any evidentiary basis. As of October 14, 1976, the precise details of the merger agreement were known to the public. Any company that remained interested in acquiring Taylor Wine had more than sufficient time within which to submit a competing merger proposal or to mount a tender offer. None did.

As a matter of law, Taylor Wine and Coca-Cola were under no obligation to disclose any more than they did. Recent federal circuit court decisions support this court's conclusion that the specific terms of the other bids for a portion of Lincoln's stock were immaterial to the merger proposal as a matter of law. In *Reiss v. Pan American World Airways, Inc.*, 711 F.2d 11, 14 (2d Cir. 1983), the Second Circuit held as a matter of law that there is no duty to disclose ongoing preliminary merger negotiations, citing *Staffin v. Greenberg*, 672 F.2d 1196 (3rd Cir. 1982). *Accord Greenfield v. Heublein, Inc.*, 742 F.2d 751 (3rd Cir. 1984), cert. denied, 105 S. Ct. 1189 (1985); *Starkman v. Marathon Oil Co.*, 772 F.2d 231 (6th Cir. 1985), cert. denied, 106 S. Ct. 1195 (1986); *Bucher v. Shumway*, Fed. Sec. L. Rep. (CCH), 97, 142 (S.D.N.Y. 1979), *aff'd* 622 F.2d 572 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980). Such negotiations do not rise to the level of a material corporate development requiring disclosure until the parties have reached an agreement in principle to merge, which includes an agreement as to price and the structure of the merger. *Greenfield*, 742 F.2d at 75.

In the instant case, the negotiations or bids that plaintiff claims should have been disclosed could not even be remotely characterized as preliminary merger negotiations. They were not merger negotiations. They were offers to a shareholder of Taylor Wine to purchase some of the shareholder's stock with an eye toward possibly initiating merger discussions with Taylor Wine in the future. They in no way rose to the level of a material corporate development.

This court's conclusion is further supported by the recent Second Circuit decision in *Beaumont v. American Can Co.*, No. 85-9063, slip op. at 4795 (2d Cir. July 24, 1986).

Beaumont arose out of the merger of Associated Madison Co., Inc. into American Can Company. According to the final terms of the merger, the Associated shareholders received 0.4545 shares of American Can per share of Associated, which resulted in an exchange value of $12.61 per Associated share on the day of the exchange. The plaintiffs in that case claimed, *inter alia*, that the proxy statement omitted certain material information, to wit, that American Can originally sought and obtained SEC approval for the merger and certain pre-merger transactions on the representation that Associated shareholders would receive $15 worth of American Can stock. This cash exchange value was later amended to provide for an exchange ratio. In affirming summary judgment in favor of the corporate defendant, the Second Circuit held that these preliminary merger terms were not material as a matter of law and therefore did not have to be disclosed.

The court held that what was important for the stockholders to know was the "actual terms of the proposed merger" not preliminary terms that were amended and modified throughout the course of negotiations between the two companies. *Id.*, at 4806. The court's reasoning is particularly appropriate to this case:

Much discussion necessarily takes place in the course of any merge negotiation, and some of it may explore the possibility of a higher price for the shareholders than that offered in the final proposal. But if companies were forced to disclose all preliminary negotiations, proxy statements would become longer and more obtuse than they already are.

Id., at 4806.

In the instant case, the Proxy Statement fairly and accurately described the actual terms of the proposed merger between Taylor Wine and Coca-Cola. (Plaintiff's Admissions, No. 77). In addition, the Proxy Statement disclosed the fact that other companies had been interested in acquiring the Lincoln Block from Lincoln and that they discussed the possibility of merging with Taylor Wine. Additional disclosure of information relating to events between a major stockholder and third parties, which never remotely approached the status of direct preliminary merger

negotiations with Taylor Wine, was not required as a matter of law.

In fact, there is good authority that if such information had been disclosed with the implication that those companies might be lurking in the bushes with merger offers that information could be deemed misleading. Courts have noted time and again that disclosure of this type of preliminary or speculative information can be very harmful to shareholders. "Some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good." *TSC Industries*, 426 U.S. at 448. As the Second Circuit noted in *Reiss,* 711 F.2d at 14, "[d]isclosure [of preliminary negotiations] may in fact be more misleading than secrecy so far as investment decisions are concerned."

In the case at bar, to impose a duty of disclosure in the circumstances of this case would be contrary to the prevailing view in the Second Circuit and would fly in the face of common sense. It would subvert the purpose of 14(a) by ensuring that shareholders would be buried beneath an avalanche of undifferentiated facts. *TSC Industries,* 426 U.S. at 448.

2. Self-Interest of Taylor Wine Management

Although plaintiff's precise claims on these matters are slippery at best, it appears that plaintiff believes the Proxy Statement to be deficient because Swarthout failed to disclose his true motives concerning merger with Coca-Cola which were to protect his own future.

There is no issue of materiality here. First of all, claims concerning Swarthout's motives are totally unfounded. Plaintiff's suggestion that Swarthout received a "sweetheart deal" as part of the merger is without basis in fact. After years of discovery, plaintiff has failed to produce any facts to support this claim.

Coca-Cola told Swarthout that its normal corporate policy was to retain the management of the merged corporation but that there were no guarantees as to continued employment and that Coca-Cola would not provide employment contracts as part of a merger. (Teasley Dep., pp. 125-129; Curtis Dep., p. 187). Contrary to plaintiff's assertions, it was Pepsico not Coca-Cola that apparently made "sweetheart" overtures to Swarthout and

promised to "take care of" him. (Deposition of Michael Doyle ["Doyle Dep."], p. 185).

There was no sweetheart deal; there were no "golden parachutes." In fact, Swarthout was "given" early retirement by C Coca-Cola approximately eighteen months after the merger. (Teasley Dep., pp. 43-44, 175-77).

In any event, the Proxy Statement clearly advised shareholders that "[n]o significant changes in Taylor's existing management are expected to take place after the merger." In fact, the Proxy Statement listed by name the seven current Taylor Wine directors, including Swarthout, who would continue to sit on the Board after the merger. (Proxy Statement, pp. 3-4).

The Proxy Statement advised Taylor Wine shareholders of the objective facts. After many years of litigation, plaintiff has failed to point to any concrete *facts* to the contrary.

Plaintiff's claim concerning Swarthout's advising Coca-Cola to raise its bid for the Lincoln Block stock is equally difficult to fathom.

It was no secret that Swarthout and others preferred Coca-Cola as a partner. The shareholders were advised in the Proxy Statement that Taylor Wine management had urged Lincoln to accept Coca-Cola's offer to purchase the Lincoln Block of stock.

The Proxy Statement is quite specific on this point:

Taylor management and its Board of Directors investigated the possibility of ownership of a large block of Taylor shares by or a merger with each of these companies. Taylor then advised Lincoln, in its view, serious antitrust or other legal problems could arise from the sale of the Lincoln block to certain of the companies and that, on the basis of its evaluation of the various companies, the interests of Taylor and its shareholders would be best served if the shares were to be sold to The Coca-Cola Company. (Proxy Statement, pp. 5-6).

Plaintiff attempts to make much of the fact that during preliminary negotiations to purchase the Lincoln Block, Swarthout told Coca-Cola representatives that Coca-Cola would have to raise its bid in excess of $18 a share if it hoped to be the successful bidder. From this conversation with a prospective bidder, plain-

tiff would have us believe that Swarthout was somehow acting contrary to Taylor Wine's best interests. On the contrary, it appears that Swarthout was trying to get a better deal for Taylor Wine's shareholders.

There was no evidence that the bids were secret to the extent that Taylor Wine could not have discussed them with other bidders. In fact, in testimony before the SEC, Herman Schaefer, Executive Vice-President of Pepsico, testified that Lincoln Bank told him that the bank *would* discuss the bids with Taylor Wine and the bank made no promise of confidentiality concerning Pepsico's bid. (Schaefer Aff., Ex. 1, pp. 15-21). Even if the other bidders were upset by Swarthout's actions, I fail to see how this affects Taylor Wine's interest.

In any event, whatever Swarthout's secret motives were, there is no obligation to report those motives in the Proxy Statement. *Bucher*, Fed. Sec. L. Rep., at 96,300; *Koppel v. Wien*, 575 F. Supp. 960, 967 (S.D.N.Y. 1983), *aff'd in part and rev'd in part on other grounds*, 743 F.2d 129 (2d Cir. 1984). Furthermore, even if there were an alleged breach of some corporate fiduciary duty, such a matter is not actionable under the federal securities laws. *Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1, 4 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984).

As to the first cause of action, defendants are entitled to summary judgment. Plaintiff has failed to establish that there is any genuine issue as to any material fact and I find as a matter of law that there were no material facts omitted from the Proxy Statement.[10]

C. Second Cause of Action -- Material Inside Information

Plaintiff's second cause of action, which is an individual derivative claim asserted on behalf of both plaintiff, and Taylor Wine and its shareholders, alleges that defendants, exclusive of Taylor Wine, violated 10(b) of the Act and Rule 10b-5. Plaintiff's claim is based on what he characterizes as a "tipping incident", namely, Swarthout's conversation with Coca-Cola's representatives advising them that Coca-Cola would have to raise its bid above $18 per share if it hoped to be the successful bidder for the Lincoln Block.

Based on this incident, plaintiff claims that Lincoln, Swarthout, Hargrave, and Farnham breached their duty to the stockholders of Taylor Wine be disclosing or allowing the disclosure of such information. . Thereafter, plaintiff claims Coca-Cola brbreached its duty to Taylor Wine by merging with Taylor Wine on the basis of this allegedly confidential information, and the other defendants breached their duty by allowing Coca-Cola to do so. Based on the objective facts, these claims are totally without merit.

The essence of Rule 10b-5 is that anyone trading *for his own account* in the securities of a corporation who has "access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone" may not take "advantage of such information knowing it is unavailable to those with whom he is dealing." *Matter of Cady, Roberts & Co.*, 40 SEC 907, 912 (1961); *SEC v. Texas Gulf Sulfur Co.*, 401 F.2d 833, 840 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971).

The standard for assessing materiality is the same under 10(b) as it is under 14(a). *Goldberg*, 567 F.2d at 218-19. A "fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries*, 426 U.S. at 449.

First of all, it is clear that this case has nothing whatsoever to do with insider trading for personal profit.[11] Even plaintiff does not suggest any such trading by Taylor Wine officials.[12] Furthermore, the incident here concerning the offer by Coca-Cola to purchase stock from Lincoln -- a shareholder of Taylor Wine -- has no material bearing on the merger proposal submitted to the Taylor Wine stockholders. As previously discussed, courts have consistently held that preliminary information and preliminary merger negotiations are not material corporate developments that mandate disclosure in a proxy statement. *Reiss*, 711 F.2d at 14; *Greenfield*, 742 F.2d at 756-57. As such, Coca-Cola had no duty to disclose this information to the Taylor Wine stockholders prior to the merger vote.

No matter how plaintiff characterizes the facts, there is no substantial likelihood that disclosure of information about

Swarthout's conversation in September 1976 concerning Coca-Cola's offer to buy some stock held by Lincoln would have been considered important by the objective reasonable Taylor Wine shareholder as he decided whether to approve the merger between Taylor Wine and Coca-Cola. Armed with the information concerning Swarthout's conversation, I suspect the reasonable shareholder would have said "so what".

In the instant case, the allegedly material information possessed by Coca-Cola did not place it in a superior position with respecttothe Taylor Wine shareholders, or with respect to negotiating the merger with Taylor Wine. The information did not relate to the proposed terms of the merger and it did not even relate to the merger negotiations that preceded the merger proposal. "The disclosure required by the Act is not a rite of confession or exercise in common law pleading. What is required is the disclosure of material objective factual matters." *Data Probe*, 722 F.2d at 5.

There is no 10b-5 violation here and therefore I recommend that defendants' motions for summary judgment be granted and that plaintiff's second cause of action be dismissed with prejudice.

D. Third Cause of Action -- §13(d) Violations

Plaintiff's third cause of action against defendants alleges violations of 13(d) and seeks monetary damages. Plaintiff claims that:

(1) The defendants joined together as a "group" to ensure Coca-Cola's purchase of sufficient stock to acquire control of Taylor Wine and thereafter the "group" failed to file a Schedule 13D as required by 17 C.F.R. §240.13D-101, and;

(2) Neither Lincoln nor Coca-Cola disclosed in their respective Schedule 13D certain material facts, to wit, the terms of the agreement between Lincoln and Coca-Cola and the plans and intent of Lincoln and Coca-Cola.

"The purpose of §13(d) is to alert the marketplace to every large, rapid aggregation or accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control. . . ." *GAF Corp. v. Milstein,* 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972). To that end, §13(d) requires any person who acquires more than five percent of a class of equity security to file a statement pursuant to 17 C.F.R. § 240.13D-101 with the issuer of the security, with the exchange where the security is traded, and with the SEC.

Even if plaintiff's claims were true, plaintiff's cause of action must be dismissed because it is well established that there is no express private cause of action under 13(d) for errors or omissions in connection with the filing of a Schedule 13D. *See Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 15 (1981). *Touche Ross & Co., v. Redington,* 442 U.S. 560, 568 (1979).

Furthermore, it is well established in this Circuit that there is no implied private cause of action for damages under 13(d). *Sanders v. Thrall Car Mfg. Co.*, 582 F. Supp. 945 (E.D.N.Y. 1983), aff'd 730 F.2d 910 (2d Cir. 1984) (*per curiam*)[13] *Wellman v. Dickinson*, 497 F. Supp. 824, 835 (S.D.N.Y. 1980), *aff'd* 647 F.2d 163 (2d Cir. 1982) *cert. denied*, 460 U.S. 1069 (1983); *Myers v. American Leisure Time Enterprises, Inc.*, 402 F. Supp. 213, 214-15 (S.D.N.Y. 1975), *aff'd* 538 F.2d 312 (2d Cir. 1976).

The court has painstakingly reviewed the entire record in this case and it is clear that this purported claim is based solely on plaintiff's obfuscation and mischaracterization of the SEC proceedings concerning Coca-Cola's obligation to file a Schedule 13D. Accordingly, this court recommends that defendant's motions for summary judgment be granted and that plaintiff's third cause of action be dismissed with prejudice.

E. Fourth Cause of Action -- Prevention of Tender Offers

Plaintiff's fourth cause of action apparently alleges a violation of §10(b) based on the activities of the defendants to prevent the submission of any tender offers either to the Taylor Wine management or shareholders during the pendency of the merger negotiations between Taylor Wine and Coca-Cola.

Plaintiff did not directly address this claim either in his legal memorandum or at oral argument. Notwithstanding plaintiff's apparent disregard of this claim, the court has thoroughly reviewed the objective and undisputed facts and finds that there is no basis for this claim.

Plaintiff's fourth cause of action should be dismissed with prejudice.

F. Damages

In this action, plaintiff seeks to recover damages for the difference between the value of the Coca-Cola stock that the Taylor

Wine shareholders received in exchange for their Taylor Wine stock and the value of the stock they might have received if they had been aware of other possible offers, or, if other offers to merge had been forthcoming.

It is clear that a stockholder must prove that he suffered damage in order to recover for misleading proxy statements. "A private plaintiff under the proxy rules is not entitled to relief simply by demonstrating that the proxy solicitation was materially false and misleading. The plaintiff must also show that he was injured and prove damages." *Parklane Hoisery Co. v. Shore,* 439 U.S. 322, 325 n. 2 (1979).

Although plaintiff has advanced four "theories" of damages, none of them have any merit whatsoever. Plaintiff's inability to articulate, much less support a viable theory of damages provides an independent basis upon which to recommend that defendants' motions for summary judgment be granted.

In his first theory of damages, plaintiff asserts that the Taylor Wine shareholders should receive damages measured by subtracting the value of the merger exchange on the date of the shareholders vote ($20.30 per share) from a $25.95 net asset per share figure. This net asset per share figure was used by Taylor Wine as an initial negotiating tactic in its merger negotiations with Coca-Cola. (Doyle Dep., p. 117-32). This figure was apparently based in part on an appraisal done by the American Appraisal Company to calculate the reproduction cost of the physical assets of Taylor Wine and which was performed specifically and solely for insurance purposes. (Affidavit of J.C. Hajek ["Hajek Aff."], Ex. D, Defendants' Motion for Summary Judgment, at ¶7).

Plaintiff has designated no specific facts that indicate that this $25.95 per share figure is anything more than the replacement value of the physical assets of Taylor Wine, which plaintiff's own expert has acknowledged bears no correlation to the price of a company's stock. (Feigen Dep., p. 1093-94). The appraisal was performed specifically and solely for insurance purposes and did not and was not intended to measure the fair market value of Taylor Wine.[14] (Hajek Aff., Ex. D at ¶7).

In this second "theory" of damages, plaintiff states that damages amount to $5 per share based on the defendants' settlement with Ralph Goldberg in a prior action. Goldberg v. Taylor Wine, 499 F. Supp. 468(E.D.N.Y. 1980). Plaintiff claims that this settlement constitutes an admission by the defendants that the Taylor Wine stock was worth $25.30 per share.

This settlement cannot be used as an admission against Taylor Wine. It is well established that such compromises cannot be used against a party in a subsequent action. *Quad/Graphics, Inc. v. Fass*, 725 F.2d 1230, 1234-36 (7th Cir. 1983); *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 486 F. Supp. 414, 423 n.10 (S.D.N.Y. 1980) (Rule 408 extends to the exclusion of completed compromises when offered against the compromiser), *aff'd*, 687 F.2d 563 (2d Cir. 1982). *See generally, 2 Weinstein's Evidence* ¶408[04] (1985).

These policy reasons inhere in the Second Circuit's decision in *Hawthorne v. Eckerson, Co.*, 77 F.2d 844, 847 (2d Cir. 1935), in which the court stated that:

Settlements have always been looked on with favor, and courts have deemed it against public policy to subject person who has compromised a claim to the hazard of having a settlement proved in a subsequent action by another person asserting a cause of action arising out of the same transaction.

Although Fed. R. Evid. 408 deals with offers of settlement, its rationale applies to the use of settlements in subsequent litigation. As the Advisory Committee commented "[t]he evidence is irrelevant, since the offer may be motivated by a desire for peace rather than for any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances." Fed. R. Evid. 408 advisory committee note.

The result in the *Goldberg* case, which plaintiff relies on here, underscores this point. Goldberg owned only five (5) shares of Taylor Wine stock. The settlement which plaintiff claims has precedential value, was for only $25 ($5 per share) plus costs. It is not too difficult to imagine why defendants decided to pay the

$25 "nuisance value" to end the case no matter how questionable they believed plaintiff's claims to have been.

In his third theory of damages, plaintiff asserts that the Taylor Wine stockholders should receive damages measured by subtracting the value of the merger exchange on the date of the shareholder's vote from the $23 maximum price per share that Coca-Cola management authorized in connection with the merger negotiations with Taylor Wine. This court agrees with defendants' characterization of this theory as specious. As with the prior two "theories", plaintiff has cited no case which would support the adoption of such an uncertain measure of damages.

In his fourth theory of damages, plaintiff contends that the Taylor Wine stockholder should receive the price per share difference between what they actually received in the stock exchange with Coca-Cola and what they *might* have received had Pepsico submitted a merger offer. Plaintiff's theory is simply too speculative to provide a certain basis for calculation of damages.

This theory is apparently based on the testimony of Herman Schaefer before the SEC on October 4, 1976. Schaefer, who was the Executive Vice-President of Finance and Administration at Pepsico during the relevant period, testified that *if* Pepsico had been aware of an outstanding offer for the Lincoln Block at $20.14 per share, Pepsico would have considered raising its offer. (Schaefer Aff., p. 35).

In an affidavit submitted by plaintiff, Schaefer stated that Pepsico had been prepared to go to $22 per share to acquire the Lincoln Block and that "*/i/f* Pepsico had known that the replacement value or the market value of the assets of Taylor Wine, especially its inventory was greater than the book value of Taylor Wine shown in the available financials it *might* have considered a higher bid than $22 per share for the 603, 648 shares if it would have had a positive impact on our pricing model." (emphasis added). (Schaefer Aff., p. 5).[15]

Review of plaintiff's submissions clearly shows that his theory of damages is purely conjectural. Plaintiff would have this court, if it found liability on the part of the defendants, calculate damages based on what other companies might have, but did not offer

either for the purchase of the Lincoln stock or in connection with a full-fledged merger with Taylor Wine. Plaintiff's own submissions highlight the uncertain and speculative nature of this theory of damages. Such speculation does not provide a legitimate measure of damages. *Flum Partners, Inc. v. Child World*, 557 F. Supp. 492, (S.D.N.Y. 1983); *Alameda Oil Co., v. Ideal Basic Industries, Inc.*, 337 F. Supp.194, 196 (D. Colo. 1972); *Labaton v. Universal Leaf Tobacco Co.*, Fed. Sec. L. Rep. (CCH) 96, 943 at 95, 947 (S.D.N.Y. 1979).

It is not surprising that plaintiff has had to resort to such "creative" and speculative means to measure damages. The entire theory of this case, both as to liability and as to damages, has been based upon plaintiff's hopes for what might have been, but never was. Plaintiff's case has been hampered all along by the objective facts. The merger in this case provided substantial benefits for Taylor Wine stockholders. The terms of the merger provided a tax-free exchange in which Taylor Wine stockholders received the stock equivalent of $20.30 per share of Taylor Wine share, which represented a premium 70 percent higher than the $13 per share market value of the Taylor Wine stock on August 26, 1976. (Ex. C, Appendix to Defendants' Joint Motion for Summary Judgment, p. 5). Because of the tax-free nature of the stock exchange of Taylor Wine stock for Coca-Cola stock, the value of this merger to Taylor Wine stockholders actually exceeded $20.30.

Life is replete with possibilities. However, plaintiff's retrospective musings of "what might have been, if" must delay this court no longer. Plaintiff has advanced no viable theory of damages that would allow a court, even if it found liability, to calculate damages. On this basis alone,summary judgment for the defendants should be entered.

Conclusion

It is my Report and Recommendation that Defendants' several motions for summary judgment should be granted and the case dismissed.

Plaintiff's class claim under 14(a) and his individual claims under §§10(b), 13(d) and 14(a) of the Act, and Rules 10b-5, 13d-1 and 14a-9 should be dismissed with prejudice and, based on the

1 and 14a-9 should be dismissed with prejudice and, based on the authority of *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the court should decline to exercise pendent jurisdiction over plaintiff's state fiduciary claims.

With no little fanfare, this case was commenced over five years ago. There has been extensive discovery concerning all aspects of the case. Defendants have answered hundreds of interrogatories and have produced hundreds and hundreds of documents. Over five thousand pages of deposition testimony have been filed with the court. Plaintiff and his attorney have labored to establish a viable claim. In my judgment they have failed, not for lack of trying, but because the objective facts clearly demonstrate that there were no securities violations in connection with the eventual Taylor Wine - Coca-Cola merger. History has shown that the merger was beneficial for the stockholders. Virtually all of the stockholders accepted the merger and its economic benefits. The fact that plaintiff has been jousting with Taylor Wine for many years in various forums suggests to me at least a partial reason for the initiation and maintenance of this lawsuit.

Although the case has been pleaded and prosecuted by plaintiff with much vigor and rhetoric, the hard facts establish that the case has no merit. To quote the Bard: "It is a tale . . . full of sound and fury, signifying nothing." [16]

/s/ David G. Larimer
DAVID G. LARIMER
UNITED STATES MAGISTRATE

Dated: Rochester, New York
October 31, 1986.

FOOTNOTES

[1] Constituent makeup of 603,648 shares held by Lincoln: 380,373 shares - Clarence Taylor Estate; 43,000 shares - Leo P. Zimmer Estate; 80,101 shares - Fred and Harriett Taylor Foundation; 80,064 shares - Edna Zimmer Trust; 20,000 shares - Alfred University. (Exhibit F to Affidavit of Avrom S. Fischer, filed December 31, 1985.).

[2] On September 10, 1976, the written agreement between Coca-Cola and Lincoln was signed.

Alfred University, whose 44,600 shares of Taylor Wine stock were held in a custodial capacity by Lincoln Bank (McBride Dep., p. 14), apparently also signed the agreement shortly thereafter. (Ex. 2, Plaintiff's Schaefer Aff.). Plaintiff has attempted to make much ado about the exact number of Alfred chars included under both the price and 90-day restriction-on-sale provisions of the agreement. This is a non-issue. Correspondence between Lincoln and Alfred (Ex. F., Fischer Aff.) indicates some initial misunderstanding between the parties. However, these discussions have no bearing whatsoever on the issues before the court.

[3] Section 13(d) of the 1934 Act mandates, in part, that any person "who, after acquiring directly or indirectly the beneficial ownership of any equity security . . ., is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within 10 days after such acquisition, . . . file with the Commission, a statement containing such of the following information, as the Commission may by rules and regulation, prescribe . . .."

[4] The claim under 14(a) is advanced on behalf of the class of Taylor Wine stockholders certified pursuant to an order issued August 27, 1984, against all defendants.

[5] Plaintiff has conceded that Hargrave cannot be held liable as a primary violator of § 14(a). (Transcript of Oral Argument, February 7, 1986, p. 101; Ex. 10, Appendix to Hargrave Motion for Summary Judgment).

[6] Section 14(a) provides in pertinent part:

It shall be unlawful for any person, by the use of themails or by any means or instrumentality of interstatecommerce or of any facility of a national securities exchange or otherwise, in con-

travention if such rulesand regulations as the Commission may prescribe as necessary or appropriate . . ., to solicit or to permit the use of his name to solicit any proxy . . . .

Rule 14a-9 provides in pertinent part:

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy notice of meeting or other communication, written or oral, containing any statement which, at the time andin light of the circumstances under which it is made,is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

[7] Section 10(b) provides in pertinent part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

* * *

(b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 provides in pertinent part:

It shall be unlawful for any person directly or indirectly, . . .,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, . . .

[8] Although plaintiff has not pleaded the requisite jurisdictional basis, the facts as set forth in his complaint allege that Farnham, Hargrave, and Lincoln controlled Taylor Wine. (Plaintiff's Complaint, 7, 10-112). Therefore, plaintiff apparently seeks to hold these defendants alternatively liable for the proxy statement omis-

sions under 20(a) of the Act, 15 U.S.C. 78t(a), which provides in part:

Every person, who directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall be liable jointly and severally with and to the same extent as such controlled person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. 78t(a).

[9] The affidavits of three former Taylor Wine stockholders affirming that had they known of the omissions, they would not have voted in favor of the merger do not perforce create a genuine issue of fact regarding the materiality of these omissions. "The materiality test is concerned only with . . .a prototype reasonable investor". *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341,363 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973). The standard of materiality involves the determination of the significance a reasonable objective investor would have accorded to the omissions, not the subjective significance accorded by an individual investor. *See Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 94 (S.D.N.Y. 1981) (the issue is whether a reasonable investor, not the individual investor, would attach importance to the alleged omissions); *S.E.C. v. National Student Marketing Corp.*, 457 F. Supp. 682, 708 (D.D.C. 1978) (materiality is an objective question "involving the significance of an omitted or misrepresented fact to a reasonable investor . . . and not the significance of the information to various individual investors"); *In re U.S. Financial Securities, Litigation*, 69 F.R.D. 24, 45 (S.D. Cal. 1975) ("'Materiality' is viewed by an objective rather than a subjective standard. . . [t]he surrounding circumstances must be examined to determine whether a reasonable investor, not the individual investor, would attach importance to the alleged misrepresentation or omission.").

[10] Having concluded there was no primary violation of 14(a), defendants Lincoln, Hargrave, and Farnham cannot be liable as "control persons" of Taylor Wine under 20(a) of the Act. Even assuming *arguendo* the existence of a primary violation of 14(a)

by Taylor Wine, plaintiff has designated no specific facts beyond the general allegations in his complaint that indicated, or from which this court could infer, that these defendants were "in some meaningful sense culpable participants in the fraud perpetrated by controlled persons." *Lanza v. Drexel Co.*, 479 F.2d 1277, 1299 (2d Cir. 1973) (en banc).

Plaintiff has a dmitted that Coca-Cola's outside counsel, Simpson, Thacher & Bartlett, was primarily responsible for the preparation of the Proxy Statement. (Plaintiff's Admissions, No. 69). Neither Farnham nor Hargrave were members of the Taylor Wine Board of Directors during the time the Proxy Statement was prepared. (Ex. C, Hargrave Motion for Summary Judgment; Deposition of Sherman Farnham ["Farnham Dep."], pp. 96-97). Lincoln has submitted numerous affidavits from individuals involved in the disposition of the Lincoln Block attesting to Lincoln's total non-involvement in the preparation of the Proxy Statement. (Affidavit of James McBride, ¶¶57-59, Appendix to Lincoln's Motion for Summary Judgment ["Lincoln Appdx."]; Affidavit of James White, Lincoln Appdx.; Affidavit of Donald Easterly, ¶4, Lincoln Appdx.).

Plaintiff has failed to designate any facts, that create a genuine issue of material fact with respect to defendants Lincoln, Hargrave and Farnham's liability under §20(a).

[11] At all relevant times, the management of Taylor Wine owned less than 1% of the outstanding stock of Taylor Wine (Complaint, ¶8).

[12] Time and again, plaintiff has cited the case of *Securities and Exchange Com. v. Texas Gulf Sulphur*, 401 F.2d 833 (2d Cir. 1968) in support of his various claims under §10(b). However, even a cursory review of Texas Gulf demonstrates that it has no bearing on the case at hand. The information in Texas Gulf that the court held to be material concerned certain preliminary drilling tests that disclosed the existence of newly discovered silver mines, which corporate insiders used as a basis for purchasing securities for their own benefit, and passed onto others. It is the classic insider-trading tipping case.

[13] Plaintiff's counsel should be well aware of the Sanders case since he was counsel to plaintiff there.

[14] In *Seaboard World Airlines, Inc. v. Tiger International, Inc.*, 600 F.2d 355 (2d Cir. 1979), the Second Circuit adopted the "efficient market theory" as the standard for measuring the value of a corporation. "[I]n a freely and actively traded market, absent compelling reasons to believe otherwise, the market price is held to take account of asset value as well as the other economic, political, and financial factors that determine 'value'." *Id.*, quoting from *Mills v. Electric Auto-Lite Co.,* 552 F.2d 1239, 1247-48 (7th Cir.), *cert. denied,* 434 U.S. 922 (1977).

[15] Plaintiff has also submitted the affidavit of Abdul Rashid who supervised the evaluation of potential capital expenditures including corporate acquisitions at Pepsico. Rashid stated that "[i]n utilizing our pricing models to evaluate a potential corporate acquisition is a cash transaction, if Pepsico learned that the market or replacement value of the physical assets, such as plant, equipment and inventory, or the target company being evaluated were higher than the stated values in the published financials of the target company, an upward adjustment would be made in the pricing model to reflect those higher values for the plant, equipment and inventory following the projected acquisition. The adjustments that would be made in the pricing model to reflect the higher market or replacement value for the plant, equipment and inventory of the target company would result in higher values for costs of goods sold and depreciation charges with a resulting lowering of projected tax liabilities. This would lead to a higher cash flow than would be the case in a pricing model of the target company based on the stated lower book values." (Aff. of Abdul Rashid, signed December 6, 1985).

[16] *Macbeth*, Act V, scene v.

APPENDIX

The Taylor Wine Company, Inc.
Hammondsport, New York 14840

Office of
JOSEPH L. SWARTHOUT
President

December 2, 1976

Dear Shareholder:

The accompaning proxy statement and prospectus solicit your vote in favor of a merger whereby your company would become a wholly-owned subsidiary of The Coca-Cola Company. Under the terms of the merger, you would receive one share of common stock of The Coca-Cola Company in exchange for each 3.75 shares of common stock of The Taylor Wine Company you now own.

The U.S. wine market has never been more competitive. As I stated at our Annual Shareholders' Meeting in September, our major competitors are stronger than ever. In several cases they have significantly stronger financial backing than we have. Under these conditions, it becomes increasingly difficult to improve, or even maintain our share-of-market.

I have had the pleasure of being an employee of this company for more than thirty years. I have been a corporate officer since 1955. They have been interesting years of growth and opportunity. It is now my firm belief that The Taylor Wine Company would enjoy substantially greater opportunities for success in the future through the financial strength and diversity of The Coca-Cola Company.

Your Board of Directors has been advised by The First Boston Corporation, an investment banking firm, that in its opinion the terms of the propsed merger would be fair and equitable to our shareholders. Present Taylor shareholders would have a continuing interest in this company as well as a new interest in a substantially larger and unquestionable successfulcompany whose stock is listed on the New York Stock Exchange and whose shares

are widely distributed and actively traded. Your Board unanimously recommends that you vote FOR the proposed merger.

I personally thank you for your cooperation in the past and ask for your continued support in what I believe will be an exciting future for The Taylor Wine Company. I know that you will want your shares to be voted in this extremely important matter whether or not you are able to attend the special meeting in January. Therefore, I urge you to sign, date and return the enclosed proxy as soon as possible.

Sincerely,

/s/ Joseph L. Swarthout

Joseph L. Swarthout

[beginning of page 3] and the last reported sale price per share of common stock of The Coca-Cola Company was $78.75. See "Comparative Market Price Information" for more information concerning market prices.

Income Tax Consequences

Except for cash received upon the sale of fractional share interests, the proposed merger will not result in the recognition of taxable gain or loss to holders of Taylor common stock, and the cost basis and holding period of the shares of common stock of The Coca-Cola Company received by Taylor shareholders in the merger will be the same as that of their Taylor common stock exchanged. See "The Proposed Merger -- Federal Income Tax Consequences".

Investment Banking Opinion

The First Boston Corporation has advised the Taylor Board of Directors that in its opinion the proposed merger is fair and equitable to Taylor shareholders. See "The Proposed Merger -- Investment Banking Opinion" for information on the fees which The First Boston Corporation will receive from Taylor.

Appraisal Rights

Shareholders of Taylor who dissent from approval of the Merger Agreement are entitled to appraisal rights and to receive payment for their shares provided they act in strict compliance with the provisions of Section 623 of the Business Corporation

Law of the State of New York. Such dissent must be filed in writing with Taylor before the vote is taken at the meeting of shareholders and must state that the shareholder intends to demand payment for his shares if the merger is consummated. A negative vote does not constitute a sufficient written objection which complies with the statute. Shareholders of Taylor who vote in favor of the merger will not be entitled to exercise appraisal rights. The provisions of Section 623 of the New York Business Corporation Law are set forth in Exhibit C to this Proxy Statement and summarized under "The Proposed Merger -- Rights of Dissenting Shareholders."

Operation of Taylor Following the Merger

The business of Taylor conducted before the merger will be continued after the merger as a wholly-owned subsidiary of The Coca-Cola Company. After the merger, Taylor's Board of Directors will be reconstituted to consist of Russell B. Douglas, Sr., Sherman Farnham, Ransom G. MacKenzie, [end of page 3] Lloyd G. Magee, Joseph F. Meade, Jr., Seaton C. Mendall and Joseph L. Swarthout, all of whom are currently directors of Taylor except for Mr. Farnham, a former director of Taylor who did not stand for re-election at the annual meeting of shareholders of Taylor held on September 23, 1976, and Albert E. Killeen and Charles S. Lord, who are officers of The Coca-Cola Company. No significant changes in Taylor's existing management are expected to take place after the merger, although Taylor's management will be reporting to management of The Coca-Cola Company as is the case with all wholly-owned subsidiaries of The Coca-Cola Company.

THE PROPOSED MERGER

At the meeting, Taylor shareholders will consider and act upon a proposal that the Agreement and Plan of Merger dated October 29, 1976 among Taylor, The Coca-Cola Company and Interim Wine Corp. ("Wine"), a wholly-owned subsidiary of The Coca-Cola Company, be authorized and adopted. The Merger Agreement provides for the merger of Wine, a newly-organized company which was formed by The Coca-Cola Company for the express purpose of the merger and which has no business operations, into Taylor, which would be the surviving corporation. As

a result of the merger, all outstanding shares of Taylor common stock will be converted into shares of common stock of The Coca-Cola Company at the rate of one share of common stock of The Coca-Cola Company for each 3.75 shares of Taylor common stock held, and all outstanding shares of Wine common stock will remain outstanding, so that Taylor will become a wholly-owned subsidiary of The Coca-Cola Company. The Merger Agreement, which has been approved by the Boards of Directors of Taylor and The Coca-Cola Company, is attached as Exhibit A to this Proxy Statement.

The Board of Directors of Taylor recommends a vote FOR the authorization and adoption of the Merger Agreement. (See "Action by Taylor Board of Directors on Merger Proposal".)

Terms of the Merger Agreement

Summarized below are certain provisions of the Merger Agreement, which has been executed by Taylor, Wine and The Coca-Cola Company. The statements contained in this Proxy Statement regarding the terms of the Merger Agreement are qualified in their entirety by reference to the copy of the Merger Agreement which is attached Exhibit A to this Proxy Statement.

Surviving Corporation. If approved by the holders of two-thirds of the outstanding shares of Taylor common stock and unless abandoned as provided in the Merger Agreement (see "Abandonment"), the merger will become effective following completion of the necessary legal requirements in the State of New York, where Taylor and Wine are incorporated. At that time (the "Effective Date") the separate existence of Wine will cease and Wine will be merged into Taylor, which will be the corporation surviving the merger.

Exchange Rate. On the Effective Date, each publicly held outstanding share of Taylor common stock, including each share of Taylor common stock held by Lincoln First Bank of Rochester (see "Principal Shareholder of Taylor"), will be converted into shares of common stock of The Coca-Cola Company at the rate of one share of common stock of The Coca-Cola Company for each 3.75 shares of Taylor common stock held. The terms and provisions of common stock of The Coca-Cola Company are sum-

marized under "Description of Common Stock of The Coca-Cola Company."

Fractional Shares. No fractional shares of common stock of The Coca-Cola Company will be issued in the merger. Instead, during the sixty days following the Effective Date, each Taylor shareholder entitled to a fractional share interest in the merger will be given an opportunity to instruct Morgan Guaranty Trust Company of New York, Corporate Trust Department, 23 Wall Street, New York, New York 10015, acting as exchange agent for the holders of such fractional interests, either (a) to purchase the additional fractional share interest required to give him one whole share of common stock of The Coca-Cola Company or (b) to sell the fractional interest to which he is entitled and to remit to him the net proceeds. If no request for the purchase or sale of fractional interests is received by the exchange agent upon the surrender of any certificates for shares of Taylor common stock during the sixty-day period, the exchange agent will sell any fractional share interests relating thereto for the account of the holder and will pay the holder his pro rata share of the proceeds of such sale with-[End of page 3] out interest. Fractional interest purchase and sale orders will be effected by the exchange agent from time to time on the basis of prevailing market prices for shares of common stock of The Coca-Cola Company. Promptly after expiration of the aforesaid sixty-day period, the full shares representing all fractional interests with respect to which certificates for Taylor common stock have not been received will be sold. The proceeds of such sale will be held for the persons entitled to them for four years from the Effective Date, after which unclaimed funds will be paid over to The Coca-Cola Company. All brokerage commissions and transfer taxes payable in connection with fractional interest purchases and sales will be payable by Taylor.

Exchange of Shares. If the merger is approved by the necessary shareholder action, Morgan Guaranty Trust Company of New York as exchange agent will effect the distribution to Taylor shareholders of shares of common stock of The Coca-Cola Company pursuant to the Merger Agreement. Shortly after the Effective Date, holders of Taylor common stock will receive detailed

instructions as to the procedure for surrender of their Taylor stock certificates in exchange for certificates representing shares of common stock of The Coca-Cola Company.

Abandonment. The Merger Agreement provides that the merger may be abandoned on or before the Effective Date by the mutual agreement of the parties or it may be abandoned (a) at the option of any party to the Merger Agreement if the holders of 7.5% or more of the outstanding shares of Taylor common stock have filed with Taylor, prior to the taking of the vote of the Taylor shareholders, written objection to the merger (in compliance with the requirements of the New York Business Corporation Law) seeking to enforce their right to receive payment for their shares; and (b) at the option of The Coca-Cola Company and Wine or Taylor, if the Effective Date has not occurred prior to February 28, 1977. The parties also have specified rights of abandonment in the event that all requisite governmental approvals (including approvals of governmental authorities regulating the production and sale of alcoholic beverages) are not obtained or in the event that certain legal actions or proceedings affecting the merger should be instituted.

Waiver and Amendment. The provisions of the Merger Agreement may be amended by the parties if necessary, desirable or expedient in their judgment to further the purposes of the Merger Agreement or to clarify the intention of the parties or to add to or modify the covenants, terms or conditions of the Merger Agreement. In addition, any party to the Merger Agreement may waive compliance with any of the provisions which run to its benefit.

Expenses of the Merger. All expenses in connection with the merger will be paid by the respective party to the Merger Agreement which incurs the expense, whether or not the merger is consummated, except that the expense of printing this document is to be borne equally by The Coca-Cola Company and Taylor. The total expenses of the merger expected to be incurred by Taylor, including a fee of $200,000 payable to The First Boston Corporation, an investment banking firm which has expressed an opinion on the fairness of the merger (see "Investment Banking Opinion"), and the fees and expenses of Taylor's counsel, ac-

countants and other experts, its share of printing costs and other miscellaneous expenses, are estimated to be approximately $300,000.

Background of Merger Proposal

In August 1976 Taylor filed a registration statement with the Securities and Exchange Commission with respect to a proposed secondary offering of 603,648 Taylor shares held by Lincoln First Bank of Rochester ("Lincoln") in various fiduciary capacities. Following the announcement of the filing, several companies, including The Coca-Cola Company, offered to purchase the Lincoln shares and separately consulted with Taylor management regarding Taylor's willingness to discuss a possible merger should the offeror acquire the Lincoln shares. Taylor management and its Board of Directors investigated the possibility of ownership of a large block of Taylor shares by or a merger with each of these companies. Taylor then advised Lincoln that, in its view, serious antitrust or other legal problems could arise from the sale of the Lincoln block to certain of the companies and that, on the basis of its evaluation of the various companies, the interests of Taylor and its shareholders would be [End of page 5] best served if the shares were to be sold to The Coca-Cola Company. On September 8, 1976, The Coca-Cola Company and Lincoln reached an understanding with respect to the shares of Taylor common stock held by Lincoln (see "Principal Shareholder of Taylor"), and on that date Taylor and The Coca-Cola Company announced that they were entering into negotiations concerning a possible merger of the two companies. On October 14, 1976 an agreement in principle regarding the merger was reached. The Merger Agreement was considered and adopted at a meeting of Taylor's Board of Directors held on October 29, 1976 and a meeting of The Coca-Cola Company Board of Directors held on November 3, 1976.

Reasons for the Merger

From the standpoint of Taylor and its shareholders, the proposed merger would result in a continuing interest in a business heretofore conducted by Taylor, augmented by advantages afforded by The Coca-Cola Company's financial strength and diversified business. In addition, shareholders of Taylor would

receive stock of a company that is substantially larger than Taylor, and whose shares are listed on the New York Stock Exchange and widely distributed and actively traded. The proposed merger would permit The Coca-Cola Company to broaden its participation in the beverage products field.

Determination of Exchange Rate

The terms of the Merger Agreement are the result of arm's-length bargaining between representatives of Taylor and of The Coca-Cola Company. In the negotiations relating to the Merger Agreement, numerous factors were considered by both parties in determining the exchange rate of Taylor common stock and common stock of The Coca-Cola Company for the proposed merger, including the financial positions and recent operating results of Taylor and The Coca-Cola Company, their respective recent earnings trends and future earnings potentials, their respective book values, the nature of their respective businesses, the recent market prices of their common stocks, the nature and relative liquidity of the markets for their common stocks, and the dividend rates on their common stocks, as well as the potential for increases in dividend rates.

Investment Banking Opinion

The Taylor Board of Directors requested The First Boston Corporation, an investment banking firm, to consider the fairness of the proposed merger to the Taylor shareholders. The First Boston Corporation has considered numerous factors relating to Taylor and The Coca-Cola Company and has advised the Taylor Board of Directors that in its opinion the merger is fair and equitable to the holders of Taylor common stock. A copy of that opinion is attached to this Proxy Statement as Exhibit B.

The First Boston Corporation has acted as financial adviser to Taylor in connection with the proposed merger and will be paid a fee of $200,000 for such services plus out-of-pocket expenses. In addition, it rendered financial advice to Taylor in connection with a variety of matters since July 1, 1976 and will receive a fee of approximately $100,000 from Taylor for those services.

Federal Income Tax Consequences

Taylor has requested a ruling from the Internal Revenue Service to the effect that:

(a) The merger will constitute a reorganization within the meaning of Sections 368 (a)(1)(A) and 368(a)(2)(E) of the Internal Revenue Code of 1954, as amended.

(b) No gain or loss for Federal income tax purposes will be recognized by Taylor upon the merger or by the holders of Taylor common stock upon the exchange of their shares of Taylor common stock for shares of common stock of The Coca-Cola Company.

(c) The basis of the shares of common stock of The Coca-Cola Company (including fractional share interests) received by the holders of Taylor common stock pursuant to the merger will be the same as the basis for the Taylor common stock surrendered, and the holding period for [End of page 6]

The Coca-Cola Company has paid consecutive quarterly cash dividends since 1922. For each of the past five fiscal years, the most recent of which ended December 31, 1975, cash dividends per share were $1.58, $1.64, $1.80, $2.08 and $2.30, respectively. The Coca-Cola Company paid dividends to its stockholders of $.66 1/4 per share on April 1, July 1 and October 1, 1976. On November 3, 1976, The Coca-Cola Company declared a quarterly cash dividend on common stock of The Coca-Cola Company of $.66 11/4 per share payable on December 15, 1976 to stockholders of record on December 1, 1976. It is the intention of the Board of Directors of The Coca-Cola Company to consider the payment of future dividends in light of earnings, capital requirements, the financial condition of The Coca-Cola Company and other factors.

The Coca-Cola Company intends to offer to its stockholders an opportunity to have their dividends reinvested automatically in additional shares of its common stock effective April 1, 1977. Following completion of the proposed merger, information on participation in this plan will be distributed to the present shareholders of Taylor.

PRINCIPAL SHAREHOLDER OF TAYLOR

Lincoln First Bank of Rochester ("Lincoln") held or record on November 5, 1976, but not beneficially, as trustee under certain trusts and in various other fiduciary and other capacities a total of 1,183,391 shares of Taylor common stock, or approximately 27% of the total shares then outstanding. To the knowledge of Taylor's management, no other person owns of record or beneficially more than 10% of the outstanding shares of Taylor common stock.

The Coca-Cola Company has entered into an agreement with respect to 603,648 shares of Taylor common stock held by Lincoln. The agreement provides that, in consideration of Lincoln's undertaking not to dispose of those shares of Taylor common stock during the pendency of merger negotiations between The Coca-Cola Company and Taylor, The Coca-Cola Company would purchase those shares at a price of $18.07 per share if a merger agreement between The Coca-Cola company and Taylor was not agreed to by December 10, 1976, or if a merger between The Coca-Cola Company and Taylor is not consummated by February 28, 1977. Since a merger agreement has been entered into between The Coca-Cola Company and Taylor, the agreement with Lincoln will not become operative unless the merger is not consummated by February 28, 1977. If the merger is consummated prior to that date, the shares of Taylor common stock held by Lincoln will be converted into shares of common stock of The Coca-Cola Company on exactly the same basis as shares of Taylor common stock held by other shareholders of Taylor. The Coca-Cola Company has agreed to file one registration statement on Form S-16 at its expense covering the shares of common stock of The Coca-Cola Company into which the shares of Taylor common stock covered by the foregoing agreement are converted pursuant to the merger in the event that Lincoln so requests. On November 12, 1976 The Coca-Cola Company filed with the Securities and Exchange Commission a statement on Schedule 13D under the Securities Exchange Act of 1934 with respect to its agreement with Lincoln, disclaiming, however, that it held any beneficial interest in the shares of Taylor common stock subject to that agreement so as to require such a filing. On December 1, 1976 The Coca-Cola Company was notified infor-

mally by the staff of the Securities and Exchange Commission that it had been authorized by the Commission to bring an administrative proceeding under Section 15(c)(4) to determine whether The Coca-Cola Company had failed to comply in any material respect with any provision of Section 13 of the Securities Exchange Act of 1934 or any rule or regulation thereunder and whether the Commission should issue an order requiring The Coca-Cola Company to comply with such provision, rule or regulation. [end of page 9]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WALTER S. TAYLOR,

Plaintiff, Civ-83-887C

-v-

TAYLOR WINE CO., INC.,
JOSEPH L. SWARTHOUT,
SHERMAN FARNHAM,
ALEXANDER D. HARGRAVE,
COCA-COLA CO.,
LINCOLN FIRST BANK OF ROCHESTER,

Defendants.

On October 31, 1986, United States Magistrate David G. Larimer filed his recommendation and report in this action. He recommends that summary judgment be granted in favor of all defendants, dismissing all plaintiff's federal claims. The Magistrate recommends that plaintiff's pendant state claims be dismissed pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1986).

The time to file objections to the report was extended by the court, and plaintiff has filed over 100 objections to it. (Item 235 and 242). Following that, the court heard oral argument on the objections on July 10, 1987.

The Magistrate's report (item 231) is careful and thorough and reviews plaintiff's argument on each of his claims. The objections are without merit. The court does not believe further discussion of plaintiff's claims is required, for Magistrate Larimer has disposed of each and every one of them in his report.

The report of the Magistrate is affirmed. The Clerk is directed to enter judgment dismissing plaintiff's complaint in its entirety.

So ordered.

/s/JOHN T. CURTIN
JOHN T. CURTIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of March, one thousand nine hundred and eighty-eight.

PRESENT:

Hon. James L. Oakes
Hon. Jon O. Newman
Circuit Judges,
Hon. John F. Keenan,
District Judge.

Walter S. Taylor,

Appellant,

-v-

The Taylor Wine Co., Inc.; Joseph L. Swarthout; Sherman Farnham; Alexander D. Hargrave; The Coca-Cola Company; and Lincoln First Bank of Rochester,

Appellees.

ORDER

Walter S. Taylor appeals a decision by the United State District Court for the Western District of New York, John T. Curtin, Judge, granting summary judgment to defendants in an action challenging the 1977 merger of The Taylor Wine Company and The Coca-Cola Company. We affirm for the reasons discussed in then Magistrate David G. Larimer's 1986 Report and Recommendation, which was affirmed by Judge Curtin.

JAMES L. OAKES,

JON O. NEWMAN, Circuit Judges.

JON F. KEENAN, District Judge.

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* Of the United States District Court for the Sourthern Distrcit of New York, sitting by designation

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of April, one thousand nine hundred and eighty-eight.

WALTER S. TAYLOR,

Plaintiff-Appellant,

-v-

TAYLOR WINE CO., INC., JOSEPH L. SWARTHOUT, SHERMAN FARNHAM, ALEXANDER D. HARGRAVE, COCA-COLA CO.,

LINCOLN FIRST BANK OF ROCHESTER,

Defendants-Appellees

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant Walter S. Taylor.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith

Elaine B. Goldsmith

Clerk

SECURITIES EXCHANGE ACT OF 1934

RELEASE NO. 13655/JUNE 21 1977

In the Matter of

THE COCA-COLA COMPANY

ORDER INSTITUTING PROCEEDINGS AND IMPOSING REMEDIAL SANCTION

Haveing been been advised of a proposed administrative proceeding by the commission pursuant to Section 15(c)(4) of the Securities Exchange Act of 1934 (Exchange Act"), The Coca-Cola Company ("Resppondent") has submitted an Offer of Settlement which the Commission has determined to acept. Solely forth purpose ofthese proceedings, and without admitting or denying the findis herein, Respondent consents to the findings and sanctions set forth below.

Accordingly, **IT IS ORDERED** that proceedings pursuant to Section 15(c)(4) of the Exchange Act be,and they hereby are, instututed.

As a result of an investigation, the Division of Enforcement alleges and, on the basis of Respondent's Offer of Settlement, the Commission finds that Respondent violated Section 13(d) of the Exchange Act and Rule 13d-1 thereunder after acquiring beneficial ownership of more than five percent of the common stock of The Taylor Wine Company, Inc. ("Taylor") by failing to file a Schedule l3D within l0 days of the date such beneficial ownership was acquired, and by filing a Schedule l3D nearly two months after the ten-day period had expired which contained incorrect information in that Respondent disclaimed beneficial ownership of a block of shares of Taylor common stock which constituted more than five percent of the common stock of Taylor. In so finding, the Commission approves and adopts the Division of Enforcement's Statement of Matters submitted by the Division of Enforcement for the purpose of this proceeding which is attached hereto and incorporated here in by reference. Accordingly, **IT IS ORDERED** as follows:Respondent, The Coca-Cola Company, correct the "Statement of Schedule 13D" that it field on November 12, 1976 by deleting all disclaimers of beneficial ownership in the securities of Taylor. By the Commission

George A. Fitzsimmons

Secretary

Attachment

In the Matter of

THE COCA-COLA COMPANY

Admin. Proc. File No. 3-5227

STATEMENT OF MATTERS BY ;THE DIVISONOF ENFORCEMENT TO BE CONSIDERED AT PUBIC HEARING PURUSANT TO SECTION 15(c)(4) OF THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED

The Statement of Matters by the Division of Enforcement:

1. Lincoln First Bank of Rochester ("Lincoln") is a wholly-owned subsidiary of Lincoln First Banks, Inc. and is chartered under the laws of the State of New York.

2. On August 6, 1976, Lincoln filed a Form S-7 registration statement with the Commission for a secondary offering of 603,648 shares of Taylor common stock (the "block") which constituted approximately 14% of the total number of shares of Taylor common stock outstanding.

3. Lincoln held the block in a fiduciary capacity under various trusts and agreements for the beneficial owners.

4. On August 13, 1976, after preliminary prospectuses had been circulated, Lincoln was contacted by Allen & Company, the first of many companies and investment bankers who expressed an interest in purchasing the entire block in the ensuing several weeks.

5. On August 25, 1976, Allen & Company indicated that their client, Oakbrook, Inc. would offer $15 a share for the block and on August 27, 1976, they confirmed this offer in writing.

6. During the period from August 27, 1976 through September 8, 1976, Lincoln received additional offers for the stock from Maron Obernauer and IFFI, S.A., Beatrice Foods, Norton-Simon, Coca-Cola, and PepsiCo.

7. The offerors were told that the terms of their offers would be kept confidential, that Lincoln would accept an offer on Sep-

tember 8, 1976, and at least one offeror was told that only unconditional cash bids would be considered.

8. All the offers, with the exception of Coca-Cola's offer, were unconditional cash bids.

9. The terms of Coca-Cola's offer on the morning of September 8 were that Coca-Cola would guarantee $15.25 a share to Lincoln if CocaCola and Taylor had not reached a merger agreement within about 90 days and if such merger was not consummated thereafter. If a merger agreement was reached and consummated, the block would participate in the exchange on an equal basis with the balance of the common stock.

10. The highest offer on the morning of September 8 was NortonSimon's offer of $20 a share. However, New York law apparently forbade the acquisition of a substantial interest in a winery by a party also owning an interest in a distilled spirits operation and Norton Simon was in the distilled spirits industry in Kentucky.

11. In the early afternoon of September 8, Pepsico submitted an offer to Lincoln. Lincoln had been previously advised that Pepsico would submit an offer at that time.

12. The terms of Pepsico's offer were that it would pay $18.01 a share or $.10 a share over other bids up to a limit of $20.13 a share.

13. On the morning of September 8, Joseph Swarthout, President of Taylor, met with representatives of Coca-Cola, including Harry Teasley, a Vice-President of Coca-Cola, and indicated that he was concerned that Coca-Cola's bid would not be accepted and urged Coca-Cola to raise their bid.

14. Later in the day on September 8, Joseph Swarthout met with representatives of Lincoln who indicated that they had receive received a bid from Pepsico and that in order for Coca-Cola to be a successful bidder it would have to increase the cash terms of its bid to over $18 a share.

15. After Joseph Swarthout met with Lincoln, he again met with Harry Teasley of Coca-Cola and relayed the information that he had received from Lincoln.

16. As a result of the meeting with Joseph Swarthout, Coca-Cola raised the cash terms of its bid to $18.07 a share.

17. In the afternoon and early evening of September 8, 1976 CocaCola and Lincoln and their representative attorneys reached an agreement concerning the block (the "Coca-Cola-Lincoln Agreement"), . . . The parties agreed that the agreement would be dated September 10, 1976 and copies would be signed and exchanged through the mails.

18. The Coca-Cola-Lincoln Agreement provided that Coca-Cola would purchase the block at $18.07 a share if Coca-Cola and Taylor had not reached a merger agreement by December 10, 1976 and if such merger was not consummated by February 28, 1977.

19. The purpose of the Coca-Cola-Lincoln Agreement, from CocaCola's viewpoint, was to insure that no other entity could purchase the block from Lincoln while Coca-Cola and Taylor were conducting merger negotiations. If merger negotiations did not result in a merger agreement being reached, Coca-Cola would take title to the block, and then could proceed to make a tender offer for additional shares of Taylor.

20. The Coca Cola-Lincoln Agreement had the effect of making Coca-Cola a "beneficial owner" of the block for purposes of Rule 13d-1, thus requiring Coca-Cola to file a Schedule 13D with the Commission on or before September 18, 1976.

21. Coca-Cola did not file a Schedule 13D with the Commission on or before September 18,1976.

22. After being informed by the staff of the Division of Enforcement that the staff intended to recommend enforcement proceedings against Coca-Cola for violation of Section 13(d) of the Exchange Act and Rule 13d-1 thereunder, Coca-Cola in a memorandum in opposition to pthe staff position offered to, and on November 12, 1976 did file a "Statement on Schedule 13d" with the Commission in which Coca-Cola disclaimed any beneficial interest in the stock.

23. The statement on Schedule 13d filed by Coca-Cola is incorrect in that Coca-Cola disclaimed beneficial ownership of

the block although the Coca-Cola-Lincoln Agreement in fact made Coca-Cola a beneficial owner of the block.

Statutes and Rules

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b):

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of a national securities exchange-
(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5, 17 C.F.R. §240:10b-5:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of a national securities exchange,
(a) to employ any device, scheme, or artifice to defraud,
(b) to make any untrue statement of a material statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or
(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a):

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise in contravention of such rules and regulations as the Commission may

prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

Rule 14a-9, 17 C.F.R. §240:14a-9,

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.